S. HRG. 100-702

TRIBAL COURT SYSTEMS AND INDIAN CIVIL RIGHTS ACT

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

TO PROVIDE AN OVERVIEW OF THE STATUS OF TRIBAL COURTS IN TODAY'S LEGAL SYSTEM

JANUARY 22, 1988
WASHINGTON, DC

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HEARING ON TRIBAL COURT SYSTEMS AND THE INDIAN CIVIL RIGHTS ACT

FRIDAY, JANUARY 22, 1988

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room 562, Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and Evans.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII AND CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. This afternoon the committee will be receiving testimony on tribal court systems, their development and evolution over the past 100 years, their relationships with the courts of other sovereign entities, and the manner in which the provisions of the Indian Civil Rights Act are applied by tribal courts in Indian country.

We will be asking our distinguished panelists to provide their perspectives on these issues and to provide the committee with an overview of the status of tribal courts in today's legal system.

I have a much lengthier statement, but I will place those words in the record in order to give the panel more time to give their report as to the proceedings that we have witnessed in the past 2 days.

This hearing, as you know, is a sequel to the Working Conference on Court Systems in Indian Country which was sponsored by the National Indian Justice Center and the American Indian Lawyer Training Program.

[Prepared statement of Senator Inouye appears in the appendix.]

The CHAIRMAN. So, without further comment, I would like to call upon the first panel, and I have been advised that the first speaker will be Professor Charles F. Wilkinson of the University of Colorado School of Law of Boulder, CO.

Professor.

STATEMENT OF CHARLES F. WILKINSON, PROFESSOR OF LAW, UNIVERSITY OF COLORADO SCHOOL OF LAW, BOULDER, CO

Mr. WILKINSON. Thank you, Mr. Chairman.

If I may I would like to make one personal comment. I cannot tell you how often I have heard praise from Indian people of this

committee's work over the last year. You and the vice chairman are people with very heavy responsibilities and you have given an amount of your time and dedication to these issues that is beyond any reasonable call. I know you both receive a good deal of commendation, but I would like to say, as just one observer, that your commitment to Indian issues really is an extraordinary thing.

The CHAIRMAN. Thank you for your generous remarks.

Mr. WILKINSON. I will take perhaps 15 or 20 minutes at the most to survey the development of the jurisdiction of tribal justice systems. First however, I would like to make these general observations.

It is the view, I think, of the many people who attended the hearings the last 2 days in this room that it's terribly important that we do look at whole justice systems, including not just the judges themselves, but their support staffs and law enforcement also, and that this is a time when the opportunity is ripe to really send Indian court systems into a new era.

The starting point for examining the status of tribal courts should be to underscore the constitutional status of Indian tribes. we have finally begun to appreciate that there are three sources of sovereignty in the United States: the United States itself, the States, and Indian tribes. Those are the three sources of governmental authority within our constitutional system. In this country, Indian tribes have been exercising that governmental authority increasingly in modern times and have really lived up to that high status of being a sovereign within the constitutional system.

It is also important to recognize that tribal courts are very young systems. Most tribal courts, in their current incarnations, are 20 years old or less. They need, and deserve, to be given their legs and accredited time to develope.

I want to say, too, that during a period when the Civil Rights Commission is scrutinizing over civil rights in Indian country, that it is worth remembering exact what is the most basic civil right of all Indian people. The most essential civil liberty that their ancestors bargained for is not a civil right in the traditional constitutional sense. It exists within the constitutional system, but its source is in aboriginal times. It is the right of native people to self-government. As this committee well knows, the first priority of Indian tribes and individuals, along with preserving the Indian land base, is to have tribal sovereignty protected and fortified.

Let me briefly, then, look at the way in which tribal justice systems have evolved. Of course, before contact with the Europeans, American Indian people had complete sovereignty. They had very sophisticated law ways, ways of dealing with disputes. They operated, as jurisprudential scholars have found, on a very high level. Many tribes punished by scorn and required retribution when a tribal member committed a crime, so that the person who committed the crime, for example, would be required to care for the family of the person who had been injured. Needless to say, that kind of system was promised on the existence of tight-knit societies and began to break down with the arrival of Europeans. That complete sovereignty existing in aboriginal times has been eroded over the years.

In the early Trade and Intercourse Acts, enacted in the 1790's, Congress provided that crimes by non-Indians in Indian country against an Indian would under most circumstances go to Federal courts. In 1882 the Supreme Court held in the *McBratney* case that a crime by a non-Indian against another non-Indian would go to State court. Scholars have criticized that opinion, but that has been the law for over a century.

In 1883, an extraordinary opinion was handed down by the U.S. Supreme Court. In the *ex parte Crow Dog* decision, the Court held that when one Indian murdered another in Indian country there was no Federal jurisdiction at all; The Sioux Tribe was an independent sovereign, and even so serious a crime as murder would be resolved within the tribal justice system.

Congress did not approve of that result and, 2 years later in 1885, passed the Major Crimes Act that took six crimes—murder and some others—and provided that they would be tried in Federal court. The list of major crimes has been expanded over time, with each of these actions being an incursion upon tribal sovereignty. When the Federal Government provides that rape, for example, will be tried in Federal court rather than tribal court, that is an incursion on tribal sovereignty.

One statute isn't commonly thought of as a jurisdictional act but had profound impact on tribal justice systems. I am referring to the General Allotment Act of 1887. As this committee knows, Indian reservations in 1887 accounted for 140 million acres of land in this country. Over the next 40 years, because of allotment and the opening of many reservations for homesteading, the total Indian land base dropped by 90 million acres, down to approximately 50 million acres, the current amount. Tribal justice systems were profoundly affected. The new non-Indian residents within Indian country , had different ways and different traditions. Theodore Roosevelt called the allotment act a giant pulverizing machine because of its impact on Indian society.

The Bureau of Indian Affairs established Federal police systems and courts in Indian country in the 1880's. Thus there was another competing system within Indian country. Traditional tribal justice systems began to wither during this long 50-year period beginning in the 1880's. The old traditional ways were attenuated the old religious ways were attenuated, and the traditional tribal justice systems began to lapse into non-use.

There was some reinvigoration in the 1930's when the Indian Reorganization Act, and the Collier administration encouraged tribal courts. But, of course, tribes were debilitated during the 1950's by the termination policy. Some tribes were terminated and lost their jurisdiction completely. Others were made subject to Public Law 280, passed in 1953, which provided that on some reservations State courts would hear civil and criminal cases involving Indians. In the past, those cases had always been heard by tribal courts. Tribal jurisdiction was dealt a serious blow by Public Law 280, which removed so many kinds of cases from the tribal justice systems.

Then the Indian Civil Rights Act was passed in 1968. Congress enacted the ICRA because the Supreme Court had reached another extraordinary conclusion, one not much appreciated even by consti-

tutional scholars. This third source of sovereignty, the governmental authority held by American Indian tribes, is not limited by normal Bill of Rights guarantees. The Court's reasoning is very logical and straightforward. The first 10 amendments basically provide that Congress shall pass no law concerning freedom of speech, freedom of religion; tribes are not Federal entities—they have their own inherent sovereignty—so the Bill of Rights does not apply to tribes. The 14th amendment provides that the States shall pass no law denying equal protection or due process, which has been construed to include most Bill of Rights guarantees. Thus the Constitution nowhere requires tribes to extend basic civil rights to persons under their jurisdiction. They are the only sovereigns in the country who are not required to provide those constitutional guarantees.

Thus Congress, during the latter part of the termination era, felt that it was appropriate for tribes to be bound by the provisions of the Bill of Rights of-many of them, anyway—and the Indian Civil Rights Act was passed in 1968. By statute, Congress required that tribes extend those basic guarantees.

In 1978 the Supreme Court held in the *Oliphant* case that tribes do not have criminal jurisdiction over non-Indians. Of course, that was a major limitation on tribal sovereignty. I think the committee may be interested in hearing from Judge Rhodes who was a tribal court judge in the early 1970's, who heard literally thousands of cases involving non-Indians, and who was widely praised for his even-handedness in doing so.

In 1978 the Court handed down another decision the *Santa Clara* v. *Martinez* case, that greatly expanded tribal court authority. The Court found that Congress had not intended to waive tribal sovereign immunity, by the Indian Civil Rights Act Therefore, a case could not be brought in Federal court to enforce the ICRA against tribes-it has to be enforced within tribal justice systems. So you have the anomaly of Congress passing a civil rights statute that can be enforced, not in Federal court, but in tribal forums.

In 1982 the Supreme Court, in this modern era when we have seen so much legislation and so much court recognition of tribal sovereignty, in 1982 the Court recognized that tribes possessed far-ranging civil jurisdiction over non-Indians, including the right to tax them. Of course, that implicates tribal justice systems because the tribal justice systems will be called in to reconcile disputes involving taxation, zoning, and environmental regulation.

Then in *National Farmers Insurance Company* case in 1985, and in the *LaPlante* case in 1987, the Court found that there is very limited jurisdiction in the Federal courts over civil cases arising in Indian country. The tribal justice systems hear them. The only role of the Federal courts in most civil cases arising in Indian country is to see whether the tribal court was correct in its conclusion about tribal jurisdiction.

So you have something of a closed system in civil cases. The decisions must be made by the tribal courts, and, again, that's unusual in our country and it shows how strong this constitutional sovereignty of Indian tribes is.

In modern times there have been some important additions to tribal sovereignty by Congress. In 1968 Congress largely reversed

Public Law 280 and took action to see that tribes would not be brought under Public Law 280 in the future and allowed States to cede back or retrocede their Public Law 280 jurisdiction that they had obtained. A number of tribes have now been granted back their jurisdiction that they once had lost lost under Public Law 280.

In 1978 Congress passed the Indian Child Welfare Act, which recognized broad tribal court jurisdiction over child welfare cases, even when the child in question lives off the reservation. That was done to protect against the extraordinary numbers of Indian children who had been adopted into non-Indian families by State courts.

Then in this decade Congress has recognized the sovereign status of tribes in several laws that allow tribal regulation over environmental matters.

The committee, as I understand it, wishes to begin perhaps an examination to see if there ought to be some action taken in regard to tribal justice systems.

I hope very much that the committee, looks very hard at whether this ought not to be seen as a watershed time in terms of really fundamental shoring up of tribal justice systems. The tribe's advancements the last 20 years, have been remarkable. This committee ought not to face squarely the question of whether tribal justice systems ought to be made far more substantial and given the wherewithal to operate in full accordance with the dignity of the weighty decisions that they have in front of them.

We are in a time where tribal courts are hearing major tax disputes personal injury cases involving millions of dollars, important criminal cases, and major regulatory cases. It's been a time of great activity in Indian country, and it seems to me that it is important to be sure that the courts do have the tools.

My recommendation is that the committee consider some substantive reform. Possibilities include a partial repeal of the decision in *Oliphant* by providing tribal courts do have misdemeanor criminal jurisdiction over non-Indians; a repeal of Public Law 280; and a clear statement by Congress that tribes do have jurisdiction over major crimes involving tribal members. These are some substantive areas that the committee might look at.

There is a second area that in my view the committee can move very quickly. I well understand that there are important budget restrictions, but I would hope the committee would see this as a truly extraordinary situation. Right now the tribal courts are funded at the level of just $9 million per year. Tribal judge salaries aren't what they ought to be, and many different aspects of support systems are not what they ought to be.

Even in these budget-tight times. I would hope that the committee would look at this situation in terms of the major civil rights at issue; in terms of there being a third source of sovereignty that exercises important powers and needs to be supported; and, in terms of Congress' trust responsibility to be certain that tribal justice systems are well fortified. This is an historic traditional Federal responsibility reaching back to the 1790's. It ought to be a matter of primary when Congress makes budget decisions.

The basic goal ought to be to fund tribal courts at a level equal to the State courts. Such an approach would recognize both the constitutional status of tribes and the major kinds of rights that tribal courts must have.

Part of the increased funding that is so desperately needed in the tribal court systems might be used as an incentive to tribes to gain their cooperation in key areas. This Congress might provide for the special funding of intertribal courts of appeals, so that there could be appeals out of the tribe in which the decision was originally made, if the tribes in the area thought it appropriate. That might also be special funding lines to provide for conferences and negotiations concerning full faith and credit, so that decrees of tribal courts and State courts will be recognized in the courts of the tribes. That process is improving, but we need to work harder on it, so that when a State court judge will readily accept a judgment from a tribal court, and vice-versa. The committee also needs to encourage the publication of tribal court opinions. We need to have a reporter series that is like the Federal Reporter or the Federal Supplement or the U.S. Supreme Court reports in terms of having an official record.

As a person who is a working scholar in this field, it does seem to me that this is a time to re-examine the stature of tribal court systems. To me, one of the most courageous, heartening, and inspiring set of developments I have seen in my professional career has been the rise not just of Indian tribes generally, but the rise of the courts and hard-working, conscientious judges who have done a remarkable job under limited resources.

My own hope would be that we are at a time where Congress would in a serious way begin to think of multiplying the annual appropriation for tribal courts. They ought to be funded at a level equivalent to the State courts. That is the best way to enhance the civil rights of all citizens in Indian country. Such an approach would enhance the courts, improve the quality of justice within them, and would be a fit and proper manifestation of Congress' special trust responsibility toward Indian tribes.

[Article by Mr. Wilkinson appears in the appendix.]

The CHAIRMAN. I thank you very much, Professor.

Before we proceed with the questions, I would like to call upon the vice chairman of the committee, Senator Evans.

Senator EVANS. Thank you, Mr. Chairman. I'm sorry I wasn't here at the beginning of the hearing. I have an opening statement which I will just file for the record.

[Prepared statement of Senator Evans appears in the appendix.]

Senator EVANS. This, I think for me at least, will be a very interesting and educational hearing to learn more about the history and the tradition of tribal courts, and also the problems that we now face today. That will give us a pretty good base to know what we should do or if we should do anything from this point forward.

The CHAIRMAN. Thank you very much.

Professor, I'd like to ask a few questions that may not have been referred to in your statement, but I'm certain that these are in the minds of all here.

Last year a measure was introduced, S. 1977, a bill to establish a Federal magistrate in the tribal courts system. Do you have any views on that?

Mr. WILKINSON. One of the main things that the Federal Government ought to be doing is to give time and resources to the young tribal courts. We ought to give them a chance. In my view they are performing well.

There are problems with the courts—there are with any court systems. To me, speaking just as one person, it is much too early to give up on the tribal courts. Rather, what we ought to be doing is taking a substantial block of resources, such as provision the of magistrates would be, and provide that level of funding to the tribal courts.

I think there's every indication that the courts will pick up that responsibility and perform beautifully, and you will see a strengthening of the tribal court systems. So, to me, this is the wrong time to bring in outside judges. It's far too early. We ought to be going in the other direction and strengthening the tribal justice systems.

The CHAIRMAN. In recent days the U.S. Commission on Civil Rights has been conducting hearings and investigations throughout this land relating to the court system. Do you have any thoughts on that?

Mr. WILKINSON. Of course, it's a matter fully within the Commission's jurisdiction, and so I respect their looking at the issue.

I question the way the Commission has gone about it. They have framed the issues in a negative way. They seem to be asking, should the powers of tribal courts be curtailed? It seems to me that is the wrong way to phrase it; a better way to look at it is whether tribal courts ought to be improved and how.

The Commission ought to be looking very, not just at ways to curtail tribal jurisdiction, but ways in which to increase it. The Commission ought to be sure funding is adequate and if not, to recommend an increase.

So, my sense is—and I don't, of course, know about their internal deliberation—but I almost feel as though they seem to be going about it negatively. I think the situation calls for the opposite—to give support and encouragement in serious ways, including the increase of powers of Indian tribes.

The CHAIRMAN. Am I correct to gather from your statement that you believe that Indian courts are doing a good job in applying or protecting the rights of people under the Indian Civil Rights Act?

Mr. WILKINSON. I would make a caveat. I am not on a reservation, and I have to gather my information from talking to people I trust and rely on. Of course, I have spent some time in tribal courts, but not being there on a day-to-day basis. I am trying to piece together the facts as best as I can.

In that context, I feel very comfortable in saying this: that the improvement of tribal courts over 2 years, 5 years, 10 years, 15 years, or 20 is absolutely dramatic. I believe that as deeply as I can. Every year you see improvement in the tribal court systems.

Just today we had two or three young judges speak at the conference. These are young law graduates, exceedingly bright people, careful people, the kind of people we want to see holding judicial positions, and to me it's an inspiring thing.

So I believe the progress is deep and broad. I think it's occurring on most reservations. To be sure you see arbitrary actions by judges; you see incorrect interpretations of the law; you see narrow-minded actions by tribal judges. Having been a practicing lawyer for 10 years, I've seen a few of those myself in court, in Federal and State court systems. But I believe that there is a tremendous amount of progress and it ought to be encouraged, by in the tribal justice systems.

The CHAIRMAN. Can you elaborate on your discussion in the book, "American Indians—Time and Law," in which you suggest that some limited Federal review authority should be considered in the jurisdiction over non-Indians?

Mr. WILKINSON. Right now in civil cases Federal courts can review tribal action only to see whether the tribe had jurisdiction over the case. It can't review the merits of the case. That has set people wondering. I imagine that members of this committee have thought of that as an anomaly—that in the United States there is a system that is substantially closed.

I took the view in that book that it might lessen the criticism on tribal courts, and might provide some fairness, in some cases a safety valve, if Federal courts had very limited jurisdiction to review the work of tribal courts. In my view it probably should be Federal courts of appeals that would do that, not district courts, to comport with the dignity of having the review of another sovereign. Therefore, if the Warm Spring Tribe of Oregon were being reviewed, it would go to the Ninth Circuit.

The review that I suggest, ought to be narrow. It is not a de novo rivary. I suggested something akin to arbitrary and capricious review. On very narrow grounds—for serious errors—the court of appeal could review what a tribal court has done.

Frankly, many representatives of Indian people have differed with me on this. Many believe that the sovereignty of Indian tribes is such that in civil cases they should be substantially free of the Federal system. But I did suggest very narrow encroachment. If that were to be done, I would hope in this era that the committee, though, would look at it this way: that we are trying to shore up tribal justice systems, not just financially, but also in terms of their substantive powers. Therefore, if there is to be any tinkering with tribal jurisdiction, there ought to be a net gain of tribal jurisdiction. Tribes are doing more responsible things and I think performing generally well. So if the committee did conclude after hearings that some sort of very limited Federal review were appropriate, it would seem to me that the committee should couple that with, for example, a repeal of *Oliphant* and some limitation on Public Law 280, and perhaps the Major Crimes Act, so that we would really in a net sense be fortifying tribal justice systems.

The CHAIRMAN. Thank you very much.

Senator Evans.

Senator EVANS. Let's see if I understand correctly. When the chairman asked about the remedies available for Indians or non-Indians, I suppose—Indians for violation of the Indian Civil Rights Act—you talked about the grand improvements in things, which is nice and it's fine that that is happening, but that's not why we do or don't pass laws. The real question is, should there be a remedy

in those cases where even under the best run of systems there can be violations?

Mr. WILKINSON. Well, I think that's fair. All I'm saying is that I would hope your review would also effectively be a review to improve the status of tribal courts, to see whether the committee believes in 1988 that, as opposed to 10 years ago, tribal courts should have jurisdiction in some criminal cases over non-Indians. I'm just saying that it seems to me they're part of a package. The kind of review you mention for consideration. I would hope you would consider, though, not just limitations on tribal jurisdiction, but also important—to see whether in modern terms we should also be expanding tribal jurisdiction in other areas, contracting it maybe in that one but expanding it in some others.

Senator EVANS. I understand that as a broader perspective. I was just dealing with this one element. I understand that you feel that the remedy in that particular case is a limited Federal appeal remedy?

Mr. WILKINSON. A limited Federal scope of review, yes.

Senator EVANS. What about in the repeal of the *Oliphant,* decision, by changing the law, we would then be expanding tribal court jurisdiction in criminal cases involving non-Indians on reservations.

Mr. WILKINSON. Yes.

Senator EVANS. What should happen in your view when you get into circumstances like that and you broaden criminal jurisdiction—then what appeals mechanism should be available?

Mr. WILKINSON. Well, on the criminal side this is not a problem because there is in 1303 of the Civil Rights Act is an express provision for habeas corpus for the Federal Courts. So there is a clear remedy there.

Senator EVANS. And you wouldn't suggest changing that?

Mr. WILKINSON. No; I think that's very sensible. Of course, in looking at *Oliphant,* the committee in what I think is attempting to modernize the law, could go at it in stages. You could provide only for misdemeanor jurisdiction over non-Indians in 1988 and revisit the question of felonies at a later time.

Senator EVANS. In sort of a third arena—we've talked about violation of the Indian Civil Rights Act; we've talked now about criminal jurisdiction—what about those cases where in tribal courts where the tribes have asserted jurisdiction in zoning and similar kinds of governmental activities for the reservation lands, a portion of which are now owned by non-Indians, and a problem arises, a case arises out of that and comes before the tribal court? Under those circumstances what should be the non-Indian's right of appeal?

Mr. WILKINSON. Again, under present law that would be a civil case and the non-Indian's right of review now would be to have, first, the tribal court make its decision and then there would be Federal court review only on one issue, and that is whether the tribe had jurisdiction; in other words, whether there was a sufficient tie with essential tribal interest, which is basically the test for tribal jurisdiction over non-Indians.

If the Federal district court concludes that the tribe has jurisdiction, then that's the end of the case. The Federal district court

doesn't see whether the award is excessive or whether the tribal court correctly applied Federal law or tribal law, or anything else. That's the one issue the Federal Court looks at.

To me—and I emphasize that I may well be in a minority of those working in this field because there are many who believe no adjustment is appropriate here—I, in light of the major actions the tribes are taking these days and in light of the fact that State decisions are reviewed by the Supreme Court on certiori, it seems to me reasonable to broaden slightly the role of the Federal courts—basically if a serious error was made by the tribe, for the court to overturn it or remand it to the tribal justice system.

Senator EVANS. Maybe this is just for my information more than anything else, based on current statutes, current law: what happens when you have a tribal—let's take zoning as an example. Tribal zoning on land within the reservation, boundaries, it's owned by non-Indians and zoning or similar property restriction ordinance by, say, the county in which all this is located—who prevails?

Mr. WILKINSON. In most cases the tribal law will prevail—in most cases.

Senator EVANS. Is that clear? When you say, in most cases, is it clear under the combination of current statutes and constitutional interpretations, though, where that boundary is?

Mr. WILKINSON. There will always be some level of discomfort between engineers and lawyers as far as precision is concerned. [Laughter.]

I can give you an engineer's——

Senator EVANS. In other words, the engineers try to draw the lines and the lawyers get all the money. [Laughter.]

Mr. WILKINSON. I won't comment from academia on that.

The answer, more precisely, is that on Indian lands, the tribe has jurisdiction, period; the State does not, period. That is whether it is Public Law 280 or not.

Senator EVANS. Yes.

Mr. WILKINSON. On non-Indian lands the Supreme Court has not ruled on zoning per se, but it is clear that the test is that the tribe has jurisdiction if there is a tie to a substantial tribal interest—health, safety, and welfare. The 9th and 10th Circuit Court of Appeals have upheld zoning of tribal lands—and of non-Indian lands, and that seems to be the law.

It's not entirely clear as to whether, then, the State can move in and also zone. If it is, say, a non-Indian parcel near—say it were a factory near a tribal wilderness area, for example—probably the tribe could exercise some authority. It's unclear what effects State law would have, I think.

Senator EVANS. As opposed to county ordinance or——

Mr. WILKINSON. Well, no, I would include the county within State——

Senator EVANS. You would put them on this——

Mr. WILKINSON. Yes; the tribe in several of those cases could zone if there were a tie to legitimate tribal interests.

Senator EVANS. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to now call upon the distinguished Lieutenant Governor of the Gila River Indian Community of Sacaton, AZ, the Hon. William R. Rhodes.

Governor Rhodes.

STATEMENT OF HON. WILLIAM R. RHODES, LIEUTENANT GOVERNOR, GILA RIVER INDIAN COMMUNITY, SACATON, AZ

Mr. RHODES. Thank you, Mr. Chairman.

Mr. Inouye, I'm going to go back in time a bit and try to propose a picture for you here that will show my experience to date is exactly that based on experience and participation in tribal government, tribal court, and the changes that have come up to date. Some of them I was involved in and hope to continue to be involved in for the betterment of our people.

I have 8 years as a law enforcement officer, a tribal officer, a Bureau of Indian Affairs officer, and 3 years as a county deputy sheriff in Maricopa County. I have 15 years on the bench as chief judge for the Gila River Community.

I am beginning a term as Lieutenant Governor for that community. The last 3 years I've been involved in private enterprise on Gila River which I had to get into for survival after the last election 3 years ago.

But in my past experience with the court, beginning in 1970 at the time I asserted jurisdiction for Gila River Indian Community, about the second month I was on the bench we asserted jurisdiction, along with some of the other tribes that had followed suit after that time for a period of about 7½ years.

On Gila River we never had a case appealed by a non-Indian. We had one case involving a former State police officer who asked the court for 30 days to review the jurisdiction of Gila River, and that was to determine whether, for his own satisfaction, whether Gila River Indian Community or tribes had jurisdiction over non-Indians.

Now he appeared before the court prior to the 30 days and submitted to the jurisdiction, indicating that he found nothing in writing that indicated that we had jurisdiction nor anything in writing that indicated that we didn't have jurisdiction.

During that 7½ years we formed a real close, good working relationship with the towns surrounding Gila River—on the south, Casa Grade; on the east, Coolidge, Florence; and on the north side, Phoenix and Tollison, Mesa, and Chandler.

We worked out beneficial to both sides means of having people from Gila River who might be facing time in the county jails or the city jails. We worked out means where they could serve their time on Gila River—in Gila River jails. We carried out the intent of the order of sentence from those surrounding courts with a follow-up return of that sentence and order, but what happened was that it allowed people to remain or be able to contain their jobs. Some of them had good jobs. They had been in with the jobs for a number of years. I remember some of them having 17 and 18 years on the job and being close to retirement. If that working relationship wasn't there between Gila River and the surrounding courts, then those people could have lost their jobs and all the benefits.

One of the things that we try to teach on Gila River is that a jail is a last resort, regardless of the offense, misdemeanors that our members may have committed, because when a judge deals with one person, the person standing before the bench, what the court does with that one person doesn't affect only him; it affects a lot of people. It affects his wife, his children, the school, and the creditors. It might cause that family to go on welfare, and we have enough of the comments about Indians being on welfare and getting free money and getting weekly checks from the Government, and all kinds of misnomers like that.

But on Gila River we work real hard trying to better the community and at the same time better the courts, which I felt that we did along with the support of the council and the people themselves. When I went on the bench, there was a 10 x 8 room, part of the jail, the BIA jail, that was the court. Now there are two courts on Gila River: one on the east end and one on the west end. We took the services to the people. We utilized all of the services that tend to deal with the social problems—alcoholism, the center for people who wanted to commit themselves or they might even be committed by the court for a time.

But the reason I'm telling you is because we dealt with the surrounding communities the same way. When the children from the high schools in the surrounding communities would come on Gila River and have parties, juvenile parties, we would intervene and bring them in and work the same way with those surrounding communities. Rather than book everybody in and have records hanging on juveniles, we would contact the parents personally and have them come in and pick up their children and rely on the parents for a home remedy type thing.

Now I'm sure that if a survey were made of the surrounding towns in Phoenix there as regards Gila River and Salt River that they would tell that they supported that type of jurisdiction, the assertion of jurisdiction, because it caused us to work closer together.

As I mentioned, there were no appeals by any non-Indians through that court, only the one person who wanted a little time to research.

Now we deal in a lot of non-Indian visiting, the tourists. We have a Gila River arts and crafts center, which you visited, and we have the three industrial parks which we have non-Indian tenants in. We haven't had any significant problems with those tenants.

In 1978 when the *Oliphant* decision came down, it was quite a blow to us, but what could we do? We had to abide by what we had to work with. For instance, the 1968 Civil Rights Act—when I went on the bench they had a code that was approved in 1936, and it was mostly CFR sections that they had pulled out and made a tribal code out of it.

The first 2 years I was on the bench we had Professor Canby, the law professor from ASU, help us with third and fourth year students, law students, to do a revision of our law and order codes, so that we could comply with the 1968 Civil Rights Act.

The tribe, Gila River Indian Community Tribal Council, even went further. There is the provision in the 1968 Civil Rights Act that counsel at your own expense. The council on Gila River went

a little further and they provided in the children's court at the expense of the tribe, knowing that it could be—could backfire on the tribe, but they went ahead and made a provision for providing legal counsel for juveniles if they could not afford it, and the parents.

So I think that in our efforts to comply with the Civil Rights Act, and whatever, to guarantee our people their rights and non-Indian surrounding communities, we've done everything possible. We've sent our judges to training through the American Indian Lawyer Training Program to begin, and then, finally, the Justice Center. Our judges continue to go to those institutions to be trained; that is, the Justice Center.

During the time that we had jurisdiction over the non-Indians—now let me go back a little further. During the time from 1965 to 1966, during the time the Blacks were burning down towns, they had nothing to lose. I was working for the sheriff's office at the time and we went on 24-hour duty. We were working right out of the assembly room because there was a threat to burn down east Phoenix and southside Chandler. So every night at curfew we had to go out and make sure these people were in their homes.

But one thing I was aware of at the time was that the Blacks had nothing to lose but everything to gain, and that was recognition. We can't compare the Indian situation to what the Blacks had—nothing to lose, but everything to gain. If we were to demonstrate like the Blacks did, we have everything to lose, and everything to us is our land. It's just about all been taken away from us.

Now I suspect myself that there is a reason for this action that the Civil Rights Commission is taking, wanting the Federal review of tribal courts. It would erode that sovereignty again, and, yet, in 1968 they said this is what you've got to do to be a recognized court. I think that most of the courts have taken the effort to try to meet that standard, but in a short time. There is no comparison to be made of the time that we're given to bring our courts up to standards and the judges—it's a slow process. I'm not an attorney, but we're getting Indian attorneys to be judges now. I think that when you make that comparison, that there is no fairness.

The Justice Center is talking about—or the Civil Rights Commission is talking about justice, and yet where is the justice when it concerns us, the tribal courts? I think that their actions are based on allegations. I haven't heard any specific courts named where those violations may have been going on. If they were, then do the investigation on that particular court and we can help them to remedy—clean it up, or whatever happened.

But I think that what's happened is that, based on the allegations that they have, they've opened a whole can up and they want to go into every tribal court and make this study.

One of the judges indicated yesterday that she had placed a call to the Commission wanting to appear and testify. She was told that she had to submit a written testimony that they would edit and they would allow her to say only what they felt could be said. Nothing could be said against the Commission or their action or anything like that—nothing derogatory toward the Commission. Is that justice? That's not freedom. That's restraint.

You know, the unfairness is right here up front. We can see it. But I do feel that tribes need to have some kind of jurisdiction over the acts of non-Indians on reservations. On Gila River we have Blacks married in there; we have Mexicans; we have Italians; we have Zunis; other tribes; whites.

The police, the Bureau of Indian Affairs police are telling the people when these people get rowdy, they're telling the members there's nothing we can do about them; they're non-Indians.

You go to the county and they say the same thing. They say, "We can't come in there because it's out of our jurisdiction." That's not what *Oliphant* says. When they took the jurisdiction away from us, they made that provision for the counties to control the non-Indian on the reservation, but they don't want to do it. But they still in their funding for law and order moneys, they still count some heads on the reservation and they get it, but they're not giving us that service.

The only time you see a deputy, or whatever, come on the reservation is right after crimes have been committed in a near town. They come on the reservation looking for the Indian that did it, you know, but that's not always the case.

Stripped cars—when you have a car that's been stripped out, clean, Indians don't have those kinds of tools and hoists and things like that.

I mentioned my past as an officer. I could look at things like that on the reservation when we find them and I could tell you whether an Indian did it or not. That's not what Indians do. If they want a quick five bucks, they take the radiator or the battery, easy things to get rid of. But the professionals that come out there and take the sports car motors and drive lines and everything like that, it's just convenient to blame it on the Indian.

We need to have some kind of control, not only on these kinds of things, but the pot hunters who come in—they come down; the visitors that come down, they have these rods about 6 foot long like a welding rod and they go around the places where people are gone and poke down in there until they hit something solid and then they dig up. Pot hunters they are called. But they're constantly in Snake Town down there. We have to watch that place. We don't have the money to have police out there all the time. They're in there taking pots and things out of there. There's laws against it, but they never get caught.

They had a skull of one of our people past down in one of the stores laughing about it, rolling it around on the counter. Those kinds of things shouldn't be allowed to go on, and that comes from more police protection. We don't have the police protection we need.

We mentioned earlier that our housing grows, and we don't have the police protection to complement patrolling those areas. Over the holidays—Christmas, Thanksgiving, New Year's—we had two officers patrolling Gila River, one on the east end and one on the west end. I'm sure, I'm positive that these same conditions exist on the other reservations.

We need to have 3-year funding, not yearly. It's a problem. It stalls the money that we need to come in. It causes problems with the tribe's cash flow, what little money we have when the funding

is held up, where the approval is held up at the area level. Three-year funding would help us at least with the cash flow problems.

As far as a U.S. magistrate, I heard the question and I wanted to address that. We have Bureau of Indian Affairs officers right now on Gila River, and, as I mentioned, they will not handle non-Indian matters. There is a provision for them to cite non-Indians to the U.S. magistrate, but it's not being done. There is a U.S. magistrate at Phoenix, but they don't cite these offenders to the U.S. magistrate. I don't know why. I think that perhaps it's time for the tribe to look at complete takeover of the police department, but that, again, needs money. The tribe cannot take over a department or a service with 70 or 80 percent funding. It needs to be funded 100 percent and continued to be funded.

The health and welfare problems—I asked the service unit director in Sacaton for a listing of the antibiotics that were handed out this past month in Gila River. We have a service unit there. We have children going into the hospital there; they're given aspirin and sent home. They say, "Bring them back in a week and we'll check them again." In two cases two infants developed double pneumonia and died in this past year. That's because aspirin doesn't kill the germ. You need antibiotics to kill the germs and keep our people healthy. I want to see how much antibiotic and proper medicine is dispensed at that service unit—one of the problems.

I think that the jurisdiction should be extended over non-Indians. I am competent that the tribal courts can handle those matters.

There is the appeal in the tribal courts which was mentioned before. In Gila River the appeal is set for the criminal misdemeanor and civil cases, and if there is a civil rights violation, then you have the writ of habeas corpus.

When one of the county courts or the State courts gets in trouble, any kind of trouble that might be—in fact, I used the Winslow court yesterday as an example. The court and the police department were both taking jewelry from the Navajo and Hopi prisoners that were imprisoned there. Jailers were taking a buckle, or whatever, turquoise jewelry, silver jewelry for a pack of cigarettes. The judge was doing this.

There was one court, and when the State finally went in, the State troopers finally went in to investigate it, it was only one court that was investigated. There was a remedy for it. The State did the remedy, but why in the case of tribal courts, when you have allegations—and I'm saying allegations because I haven't heard any courts, specific courts named as having violated civil rights—but in the case of civil or the tribal courts, one court maybe or two courts, I don't know. Why does it open the door to an investigator having hearings on all the courts, and then to be restrained from what you can testify to? I just feel that there needs to be some fairness in there.

How does the non-Indian feel with the black judge sitting on the bench now? There are several black judges in the Phoenix area that I know personally. That is not brought up. How would they feel if an Indian sat on a State court bench? I don't know why—well, I have my own ideas about why; I think there are resources that the lawyers, again, and the business people are causing this

turmoil so that they can get these cases to be heard in their own forums, you know. But I'm confident to the fact that Indian courts can as we get more Indian lawyers to be judges.

I thank you for the time you've given me here. I'll answer any questions if I can.

The CHAIRMAN. Thank you very much, Governor.

What is your opinion with regard to the establishment of intertribal courts of appeal or regional Indian courts of appeal?

Mr. RHODES. At one time we had thought about establishing a circuit court of appeals in the Arizona area, so that the implication wouldn't be there that there was unfairness, this nepotism or relatives or friends like that. We wanted to have a circuit court established in Arizona to go to all the tribal courts for that purpose.

I would be in favor of that.

The CHAIRMAN. I have heard something about the tribal justice center. What is that?

Mr. RHODES. The National Indian Justice Center? Early in the seventies, when Dick Trudall and Alan Parker and a couple of the other lawyers, young lawyers then, were getting out of law school, I had made quite an issue of the assertion of jurisdiction at some of the conferences. These lawyers approached me and asked me if I would be willing to work with them to establish then the American Indian Lawyer Training Program to begin to train tribal advocates, and they had information that I had started training tribal advocates using some of the TWEP workers on Gila River to complement the area of counsel at your own expense.

On Gila River I took—the tribal work experience program is a welfare program and to try provide some counsel for the defendants in court, I took five of those people. The welfare program was paying them. The Navajo Nation at that time had their own prosecutor training program in their academy. I sent them up there to train as advocates to work in the court.

Somehow these young men found out about that and were interested in expanding on that advocacy program, and that was the birth of the American Indian Lawyer Training Program. We expanded into training a small number at first and then more and more and more, and, of course, all the time we had to look for money, some from the Bureau and some from the private foundations. But our goal as we did this and talked, our goal was to someday have the National Indian Justice Center so that Indian judges and advocates could have a place to go and train or that center could deliver the training to different areas comparable to the Reno Center for State Court Judges.

We worked on it. It took about 12 years to finally have the reality of the Indian Justice Center. I don't know the specific number of trainees that have gone through there or the total number that have gone through in the areas where the training has been provided, but it's had its effect in tribal courts, just like on Gila River now we had a court clerk sworn in as an associate judge on the 16th. We had a prosecutor sworn in as the chief judge, who have all been to this training. The former chief judge had been to this training.

Myself, I had worked with it all the way through, and then I got out of the judicial center, the judicial branch, but that doesn't

mean I don't continue to support it. I just felt that I could do more to help the people from the other position.

I think that anyone will tell you that the justice center is providing services that it was set up to do, and I think that it can provide more. There was a cry for training for court clerks this morning. That is not done from the center at this time, but I think if that component were put into the center to handle, that the justice center could handle that also.

The CHAIRMAN. I thank you very much, Governor Rhodes.

Mr. RHODES. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Evans.

Senator EVANS. Just one question: what about the proposal that was made by Professor Wilkinson that—or at least talked about—the potential of limited Federal appeals in Federal court, limited appeals from tribal jurisdictions? What's your opinion on that?

Mr. RHODES. My opinion is that review is there through a writ of habeas corpus in either instance, the civil or the criminal, as it is set up now.

Senator EVANS. Mr. Wilkinson, I didn't get that feeling. I did under criminal, but not civil.

Mr. WILKINSON. I don't think of it as being available on civil cases.

Senator EVANS. I guess the question, then, is: do you think it should be available in civil cases?

Mr. RHODES. Well, the only reason for the writ of habeas corpus is dealing with a possible civil rights violation.

Senator EVANS. Yes.

Mr. RHODES. So you can have a civil rights violation in a civil case also, and that's what I was talking about or pointing at.

We're not all as sophisticated as the Navajo court where we could have a Supreme Court review. However, that circuit court of appeals might be in a position to handle that situation.

Senator EVANS. What about the case of a private cause of action in a tribal court with Federal appellate review for a violation of Indian civil rights rather than habeas corpus?

Mr. RHODES. Senator, we have had—in Gila River we have had some writs of habeas corpus heard by our own court. We didn't bother taking it to the Federal court. We've had a visiting judge come in and hear a writ of habeas corpus, not only once, but several times on Gila River because there was a time when we attempted to get a writ of habeas corpus in the Federal court and the U.S. attorney had told us not to bother with those trivial things. That was several years back, and so I took it upon myself at the Gila River court level to go ahead and provide that writ of habeas corpus hearing to the petitioner and have a visiting judge come in and sit on it. So we've kind of done some of those things. It could be done at the local level.

Senator EVANS. When you say "a visiting judge come in," would this be a visiting—another judge?

Mr. RHODES. From a tribal court.

Senator EVANS. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is the president of the National American Indian Court Judges Association of Pablo, Montana, the Hon. Donald D. Dupuis.

Judge.

STATEMENT OF HON. DONALD D. DUPUIS, PRESIDENT, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, PABLO, MT

Judge DUPUIS. Thank you, Senator.

As a sitting judge of the Confederation of Tribes in western Montana, I just would like to assure you that when a criminal defendant is before the court, that a rights statement is signed which is consistent with the Miranda warning that they have had these rights upon entry into the tribal court and before a plea is entered.

I believe that most of the tribal courts that I hold trials for, which includes a Blackfeet Tribe and a U&O tribe in Utah, that this same procedure is followed, and then a separate signature on waiver of a right to trial by jury when a guilty plea is accepted. Those steps are real prevalent—that we as a tribal judge certainly don't want to be charged with violation of civil rights, denying some of the rights before us.

I can't speak for all the courts in the United States of the tribal courts, but the ones that I happen to hold trials on as a visiting judge, as Judge Rhodes explained, it's usually done that way.

The tribal courts in the last 20 years have come a long way, Senator, and have had to take the responsibility for more serious cases. I think when many of us started it was simply handling a tribal member who maybe has a DUI or an offense against a person, and 99 percent because of alcoholism. Probably those are similar today, but the other areas that the jurisdiction that we had to expand on in the areas of civil were holding trials on involving hundreds of thousands and millions of dollars.

I think that the education of the tribal councils about their court system is most prevalent—to what extent the governing bodies would like their courts to extend jurisdiction to and to what level of civil that they would like us to handle.

After the trial is over, usually the process then is within 10 days they can notify us by motion for an appellate hearing. Now on the Flathead, other than the trial judge, the other three judges are set up for an appellate hearing. We also would bring in a visiting tribal court judge. The Blackfeet, for example, have a separate panel that is just appellate judges, the same as the Uninta court in Utah. There has been an appellate system built in the tribe many years.

I think the education of the tribal court judges is something that needs to be continued, especially by people who practice in tribal courts, have known tribal courts, and understand the laws of the Indian tribes.

When I first started attending training, it was mostly lawyers who had not even practiced in tribal court and all we were hearing was the Federal law says this and the State law says that. That wasn't applicable to what the tribal courts needed to do.

I think in the Indian Civil Rights Act—excuse me, the Indian Child Welfare Act—in the States that deal with Indian children, I can recall my first case was in Spokane, WA, Senator Evans' home State. It was relatively new then, and we put a petition in for reassumption of jurisdiction. When we explained, relatively new, this

act to the superior court judge within the chambers, he looked at our order; he looked at our plan for child, signed it, and away we went. This is something that the States have gone along with and honored. We've had to take on the State of California which didn't want to give us a child back. In Nebraska they did not want to honor a tribal court divorce and custody matter, and the father took the child to Nebraska. We sent our attorneys down and were successful under the act, which I think is reasonable.

Full faith and credit is mandated within the act, and many times State courts really hate to do that to a tribal court, not knowing who we are and what we're doing. But I think once it is explained, the education of the State court judges comes to that area on any child welfare act, I don't think there will be a problem along those lines.

When I was mentioning the education of the tribal court judge, as you know, again we're going down the path of a Federal judge. Where we were hearing relatively minor cases, misdemeanor crimes, et cetera, now we're dealing with irrigation, tax cases and questions, aboriginal hunting rights off the reservation, things that most of us when we were appointed a tribal judge didn't think we'd ever have to know very much about. That's interesting and it's been exciting to be on the bench.

I have been on 14 years and have known Judge Rhodes for a number of years, and lucky to know Professor Wilkinson and Professor Getches, and other tribal court judges. Now we have about 20 law-trained judges in Indian courts, which I'm really thankful they're there because, you know, when a judge needs an answer to a question, he needs to know what a judge needs to know, not particularly what a lawyer may want us to know. It's nice to have those types of people to back us up when requests come in.

The magistrate bill I think right now isn't needed, especially in Montana. One of the reasons why is on the Flathead, Kalispell, Montana, which takes care of Glacier Park, has a magistrate; Missoula, Montana and Butte deal with especially Yellowstone Park, et cetera. There are magistrates in those two cities. I think the money could better be applied to the training of tribal court personnel, especially the judges, so we can handle our cases better.

Right now our court system receives about $47,000 from the Bureau under the 638 contract, with the other $200,000 coming from tribal funds.

I think that the pride in our system that I am proud of—and I am proud to be a tribal judge, and I am proud of our system of justice. Thank you.

The CHAIRMAN. Thank you very much, Judge Dupuis.

I would like to ask a few questions on statistics. How many tribal courts are there in the United States?

Judge DUPUIS. Senator, I believe the figure is right around 150.

The CHAIRMAN. And how many American Indian tribal judges are there working today?

Judge DUPUIS. Probably on the average of about 300.

The CHAIRMAN. Of that 300, how many are law school graduates?

Judge DUPUIS. To the best of my knowledge, sir, around 20.

The CHAIRMAN. Around 20. Of those who practice before these courts such as prosecutors or tribal attorneys, about how many are trained in law schools?

Judge DUPUIS. The number is probably quite small, Senator. The advocates are usually tribal members trained in the area of defense and prosecution and do a quite admirable job, I might say. There are a number of tribes who do hire lawyers who are prosecutors and/or who are defenders. I would think my only problem with that would be the next step, they'll all want a lawyer-trained judge. I just think we have something to offer.

The CHAIRMAN. What is the pay of a judge? I suppose it differs with different tribes, but how do they range?

Judge DUPUIS. Senator, it may be hard for me to answer that. I heard upwards of some judges to a $60,000 level in larger jurisdictions. I receive about $27,000. I think as far as a Montana judge goes, I'm probably one of the higher paid Montana judges. Other States, I think around the area of probably $30,000-plus, and probably Judge Rhodes could better answer that than I.

Mr. RHODES. Senator, we just in our new budget for 1988 increased the chief judge's salary to $30,000 and the associate judges to $25,000. Hopefully, we'll get better-qualified people applying for those positions.

The CHAIRMAN. The Interior Department is proposing to fund two or three regional appellate courts in this fiscal year. What are your thoughts on the adequacy of the current appellate system of tribal courts? The same question—do you support intertribal or regional appellate court systems?

Judge DUPUIS. The regional system that I have been aware of in South Dakota involving about seven tribes seemed to work reasonably well. I'm not privy to all the information that has come out of there, although in Montana the Montana-Wyoming Tribal Court Judges Association has been working toward that end, to build in a Montana intertribal court system of appeals. We haven't gotten off the talking stage yet, mainly to allow another system to review an appellate system among the Indian tribes. I would welcome that.

The CHAIRMAN. Senator Evans.

Senator EVANS. Let me follow through a little bit on funding. In just reading some of the material that the committee provided for us as information for this hearing, it is pointed out that a little over $11 million is set aside from Federal funds for operation of Indian tribal courts. Do you have any idea of what percentage that is of the total funding for those courts? Is that a major share? Is it supplemented by a large amount of tribal funding, or do you know?

Judge DUPUIS. My experience, Senator Evans, has been, for example, our system, as I said earlier, received about $47,000 from Federal funding; the other $200,000 comes from tribal funds. Other systems that I have been dealing with, it's been very similar. Probably Mr. Little would have a better answer than I would.

Senator EVANS. I'm just curious about—well, let me just follow through in saying that, at least in terms of Federal funding, when it corresponds—that was the 1987, fiscal year 1987 allocation, the figures are that there were 230,000 cases during fiscal year 1987. That's $50 a case. It doesn't sound like very much, and that's why I was curious as to what the total funding is and really how that

compares. Maybe that is pretty good. I don't know how that compares with the amount of money per case in a local State court or even a local justice court. It sounds to me like it's pretty small.

Judge DUPUIS. Yes, sir; I would agree; $50 a case seems like it's pretty cheap.

Senator EVANS. Even if it were to be supplemented by two or three times that much money from tribal funds, you're still talking about $150 or $200 a case. It seems small. Maybe it isn't. Maybe that's what it works down to when you get on to some of the State and local jurisdictional courts, but I'll bet it doesn't.

Let me turn to one other question. We've just introduced a bill to amend the Indian Child Welfare Act, and as part of that we're concerned about the ability of the tribal courts to fully carry out the intent of the law. How can we improve the tribal courts system and its method of handling Indian child welfare cases?

You did mention some of that, and I'm just curious, what do we need on a broad scale nationwide to effectively handle these if we're going to increase the opportunity?

Judge DUPUIS. I'm not privy to all the amendments that have been made. I have been gone for a couple of weeks from my court doing other things.

One, we've had a number of discussions along these lines. I think that the tribal courts are the best equipped to handle their own children. I think we understand better about those children. Why I say that is whenever we send our children off for evaluation, oh, to what we call the CDC, the child development centers, the recommendation always comes back from the non-Indian people, "Remove the child from the home. They should not go back to the reservation." Well, there is no other place for those people to go. They aren't survivable elsewhere.

The second thing is in the act currently it says that if either parent would object to tribal court transfer or jurisdiction, it would go to the State court system. I think it should take both parents to object to that.

My tribe has told us that we will spare no money in order to pick up a child. If I went to request because my funds are low that we need to go to North Dakota, or wherever, to pick up a child, the money is made available to whatever extent that we wanted. It's things along this line.

I think there are other people who are by far better qualified to answer because, as a judge, I'm seeing the case when it gets down near the end, although the States do notify us by registered letter and I'm one of the recipients, and then we follow up. We have a court social worker that does background checks, and if the children do have relatives on the reservation or have significant contacts on the reservation and we can place them, then we will take jurisdiction back in that child.

California uses a little phrase in there, for the lack of a better term, that for good cause not to transfer, we won't transfer. They've used that, but we've gone down three or four times and taken on Los Angeles County and we're successful in the children that we were after.

I think that other improvements could be made along that line, and I just now—you caught me with a curve ball as to answer all those proper questions here right now.

Senator EVANS. Thank you.

The CHAIRMAN. Thank you very much, Judge.

Before proceeding with the next panel, without objection, a letter dated December 9, 1987 from the chairman of the Civil Rights Commission, the Honorable Clarence M. Pendleton, Jr., to the Secretary of the Interior, the Honorable Donald P. Hodel, will be made part of the record. This letter relates to the current activities of the Commission investigating civil rights.

[Letter from Mr. Pendleton to Mr. Hodel appears in the appendix.]

The CHAIRMAN. I'd like to thank this panel very much. You've been most helpful. If we may, we would like to submit to all of you other technical questions and hope that you will respond to them. Thank you.

Our next panel consists of Mr. Joseph D. Little, Chief, Judicial Services, Bureau of Indian Affairs; the executive director of the National Indian Justice Center, Mr. Joseph Myers; the judge of the Fifth Judicial Circuit Court of Utah, the Honorable William A. Thorne, Jr.; and Professor of Law David Getches, University of Colorado School of Law; and Susan Williams, Esquire, of Albuquerque, NM.

Shall we proceed with the executive director of the National Indian Justice Center, Mr. Joseph Myers?

Mr. Myers.

STATEMENT OF JOSEPH MYERS, EXECUTIVE DIRECTOR, NATIONAL INDIAN JUSTICE CENTER, PETALUMA, CA

Mr. MYERS. Thank you very much, Mr. Chairman.

I, too, would like to give my thanks to you and to the committee for your concern and your sensitivity to Native American issues. It's an inspiring position, and I think it's one that most of the people in the room feel very good about and appreciate.

I don't know whether this is protocol or not, but I'd like to begin by also giving my thanks to Patricia Zell and Alan Parker for their assistance in the conference just completed. They made things very comfortable to us, and it's very important to us to have that kind of relationship with the Federal Government.

Also, there's always unsung heroes when events like this are put together, and one of them is seated to my left, and that's Elva Arquero. She made our stay here the last few days very enjoyable and was of great assistance to us. We appreciate that very much.

The CHAIRMAN. On behalf of all of them, I thank you very much.

Mr. MYERS. I'd like to begin by stating a little experience I had in my first year of law school back many, many years ago. I was in a criminal law class and there was a case that the professor told us to read for the class the following day which involved an Indian man who had committed a homicide against another Indian man up in the Canadian territory back in the 1700's. It was a situation where this Indian person was supposed to guard the encampment of this band of Indians and there was a superstition or a tradition,

that the guards are supposed to keep away the evil spirits at night while the warriors slept.

Unfortunately, this person was the party to killing of another member of the tribe who accidentally had walked into the encampment during the night. He was doing what he was supposed to do in terms of guarding the encampment from the evil spirits.

However, this particular case was prosecuted in whatever territorial court that existed at that time under the Canadian jurisdiction, and the purpose of our reading that case was to deal with homicide and intent and those kinds of legal concepts that were foreign to those Indian people at that time the incident took place, concepts usually important to law school students.

When the case was discussed the following day, I mentioned to the professor in open class that I thought that there should be a consideration here about the fact that we're talking about two different cultures and the application of one culture's law into the lives and traditions of another culture. He told me in open class, "I'm really sick and tired of you minorities bringing up minority arguments when we're trying to deal with the law."

That was in 1972, and then in 1978, after I was out of law school for a while, the Supreme Court handed down the *Oliphant* decision. That decision effectively removes any criminal liability of white people to tribal courts, it was ironic. At the time I read the case I thought back very quickly to what I had read in law school, where the Anglo culture pulled the native culture into its hold and of liability to its laws.

There is a never-ending encroachment and it's continuing today. When we look at the future of tribal courts and the future of tribal institutions in this country, we have to look first at where we've been. Originally, Indian reservations were prison camps, and concessions were made by Indians and sometimes forcibly. I think San Carlos Apache is a prime example of a territory at one time that was a dumping ground for all of the Apache bands and tribes. There was military enforcement there to keep Indians intact and away from the emerging American society.

That gave way to other kinds of monitoring of Indian lives—the civilian Indian agent. The military gave away to the Indian police. It was a long time coming before we had tribal courts. In 1924 Indians were accorded U.S. citizenship. Although in 1887, under the General Allotment Act, if an Indian would jump through a few hoops over a 25-year period, he—and only he—would become an American citizen. That was the era when in the Indian land base was lost some 90 million acres.

Historically, that's what justice was all about in Indian country. In those days there was no concern for the individual Indian. Tribal courts are relatively young institutions. Some say that tribal courts are only, as a practical matter, 30, 35 years old.

If we look at the Federal courts 35 years into the growth of this country, you'll notice that slavery was well and alive. Then civil rights protections had no basis other than to protect those who had wealth and had access to the Federal court systems.

In Indian country we have a huge family of Indian tribes. Unfortunately, the press and the U.S. Civil Rights Commission looks upon the entire family for liability when a member or members of

that family gets into trouble. If my brother murders somebody else, am I supposed to be liable for that murder myself if I'm minding my own business providing for my own life and for my family? I suppose not. That is not the way it comes down when the media deals with perceptions of Indian country. Newspapers look at one homogeneous group of Indians out there when they write about the failures.

The Minneapolis Star Tribune early last year provided a series of articles entitled, "Tribal Courts—Islands of Injustice," a very catchy title, but a title that is very damaging and harmful to tribal courts throughout the country. In this instance reporters had a bone to pick with one tribal chairman. Yet, when they released those articles, those articles said "tribal courts."

While doing their investigation, they contacted the Justice Center and I asked if they would be interested in coming to one of our training sessions so that they could see that tribal court personnel, judges and advocates and clerks, were engaged in developing skills and gaining knowledge for the purpose of improving their systems. They came to a training session. They interviewed people. However, not any of that information was ever divulged in any detail at all in those articles, and that's very unfortunate.

When I was at the very first briefing of the U.S. Civil Rights Commission concerning this so-called investigation into post-*Martinez* violations of the Indian Civil Rights Act, the very first thing that was done by the chairman, Mr. Pendleton, before the proceedings were open, was to recognize a member in the audience who was a reporter for The Washington Post and exclaim to him that he was glad he was there and that he would like to have his participation as they moved along with the investigation.

I took exception to that. I didn't think that there was a need for newspaper sensationalism with regard to this investigation; that if the investigation had any meat to it, there would be goals to the investigation that were worthy goals. Any worthy goal other than to improve civil rights in Indian country by improving the systems that administer civil rights I think is unworthy to mention. However, that's the foot that that investigation got off on, and I was very disappointed, as one person who participated in that briefing.

Perceptions are extremely important we have been told in the past 2 days concerning how Indian tribes will fare in the future with regard to positive legislation for tribal courts. The perceptions that I have been made aware of here in Washington, DC seem to be negative in some sectors—negative when we deal with competing interests like oil corporations, mining corporations, and other economic interests concerning with reservation resources. Those interests always want to bypass tribal courts as a forum for resolving contractual and other business disputes.

This is for those folks seated behind me from the Civil Rights Commission. If you must examine tribal courts and the failures of tribal courts, and there are some failures, let's also examine the non-Indian system, too. We have the American tobacco industry in this country which manipulates the American court systems with big money while Americans die from lung cancer. The automobile industry in this country manipulates the courts in this country

with big money and fancy legal theories while people die because of defective automobiles and defective manufacturing.

We have in many major metropolitan areas what I would call assembly line, case file justice where a prosecutor will come into a courtroom and put a stack of files on the table, numbers will be read off, people will be marched out, and nothing is ever done about the reality of that person being in that courtroom. We plea bargain everything away. We deal with crowded prisons, but the person who is tracked through that system isn't tracked through that system as an individual, as a human being, only as a number. It seems to me that somewhere in that kind of condition that civil rights violation should exist.

I believe that tribal courts must be allowed time to improve, and I base that on the idea that they are very young. There some obstacles to the future, in terms of the proposed magistrates' bill. Hopefully, the magistrates' bill will not be passed. I don't see the worth of it. I think that in the very beginning, several years ago, close to the *Oliphant* decision, there may have been some good intentions behind the bill, but I don't think those purposes are the same any longer. Any vitality of the bill that was there back close to the *Oliphant* decision is no longer there, and I don't think that the bill ranks the importance that money directed toward the improvement of the tribal court system ranks.

I am really upset about the U.S. Civil Rights Commission's report. I had read a supplement of some testimony, to this committee that was written by an assistant attorney general—which said that tribal courts are incapable of providing safeguards for the Indian Civil Rights Act. I really take offense to that because if somebody or some institution is being accused of not meeting its responsibilities, then let's talk directly at that institution or that governmentor that person.

We're talking about a family of Indian tribal governments in this country, some of high sophisticated governmental administration; others very minimum in number and governmental capacity. So I really don't think that anyone should freely condemn all tribal courts, especially someone from the U.S. Department of Justice. I think that the U.S. Department of Justice should be more responsible than to make those kinds of claims.

I think an obstacle to effective tribal court operation and law and order in Indian country has been policies concerning prosecution by the U.S. attorneys who have responsibility to Indian reservations. They range from very poor to very good in some circumstances, but it seems to me that it's important that when, on the one hand, the Federal Government can look homogeneously at Indians with regard to certain programs and certain projects—I would think that there shouldn't be much problem for a national policy for the U.S. attorneys to follow concerning prosecution of major crimes in Indian country. I don't think that the U.S. attorney up in Billings should have any different approach than the U.S. attorney in Phoenix, AZ, but, nonetheless, that's the case.

There needs to be improved State-tribal relations, and that's a responsibility of the States and the tribes. Those relations are developing. This morning Judge Vicenti from Jicarilla Apache described to us the positive things that are happening in the State of

New Mexico and the State of Arizona, especially Arizona where the chief justice of the supreme court is taking it upon himself to solicit positive relationships and a way of dealing effectively between tribal and State jurisdictions in the State of Arizona. It's surprising because it is not the same vintage as their governor.

How do we improve things? Also this morning there was testimony with regard to a tribal court improvement act, one that has substance in the budget and one that deals with expansion of jurisdiction and tribal court skills through a mechanism that allows a tribal court which meets certain criteria to advance and expand jurisdiction and to provide incentives to those tribal courts that do not have or are not at the same status with regard to capacity.

I think if we're going to have any meaningful improvement in good relationships between the Federal Government and State government and tribes in the future, we have to look to positive incentives as opposed to witch hunts and negative incentives that seem to have been the approach or the methodology in the past.

We have to improve tribal institutions. There has to be, of course, more training. For the convenience of the committee on the back table—and we'll be glad to carry them over to your offices later—are manuals or samples of manuals that we have in our legal education series that we deliver to tribal court judges and tribal court advocates. If you have time to review one or two of those manuals, you'll see that the materials are very comprehensive, although we are in a very limited time deal with difficult subject matter. Just jurisdiction in Indian country is a difficult subject matter, but things like evidence, probate, and housing law, pose complex concepts. The people we train are able to take these materials back with them to their workplace and utilize them in a reference library environment. We have to build on that and provide more training materials of this kind in the future.

Just recently, the Bureau has had some funds to allow us to provide a training session in child abuse and neglect with an emphasis on sexual child abuse. As we all know, several years ago, 10 or 15 years ago, there was no mention of child sexual abuse. Today there is a serious problem concerning how the judicial institutions of this country deal with this very serious, very difficult issueand the children involved.

Courts aren't prepared to deal with questioning very young witnesses, and the young witnesses, of course, are not prepared to deal with the awesomeness of a heavy-chambered courtroom. Another issue is whether or not we should be dragging families through the judicial process for the purpose of retribution of the community. We found in conducting the child abuse training that to various degrees there needs to be an educational process undertaken that goes beyond the courts.

For an example, you may have a small village somewhere where those kinds of practices have occurred for a long time, forcibly so, but tolerated. How you change ideas and attitudes by locking somebody up? I don't have the answers for that, but those questions have to be probed in a training environment. The tribal court personnel have to be privy to the information that's available.

In the recent Alcohol and Substance Abuse Act there was money to provide some training in that area as well, and we were able to

bring down from Canada to a training session the folks from Alkali Lake who went from almost total alcoholism to 95 or 97 percent free of alcoholism. Their stories were very inspiring.

I think that alcohol-related offenses on Indian reservations have always been a problem historically. Some people say that there is some sort of genetic deficiency with regard to Indians and alcohol, but that's somewhat of a superficial conclusion. If you look very seriously at what I said earlier, that when you're bound up and forced to live guarded by the military, there are institutional problems in terms of social bondage that takes place, and it's difficult for that cycle to be broken when generations after generations of people have to look to alcohol for some way to escape the fact that there are no resources, no personal resources to deal with. I think that we have to look very seriously as Indian people to solving the problem of alcohol abuse in Indian country.

Thank you very much.

The CHAIRMAN. I thank you very much. I can assure you that the training pamphlets and material will be carefully studied and reviewed by the committee and staff.

I would like to call on the panel to complete its testimony before we ask any questions. So, if I may, I'd like to call on Judge William A. Thorne.

STATEMENT OF HON. WILLIAM A. THORNE, JR., JUDGE, FIFTH JUDICIAL CIRCUIT COURT, WEST VALLEY CITY, UT

Mr. THORNE. Thank you, Mr. Chairman.

Let me first explain why you have a State court judge in front of you talking about tribal courts. I was one of those second wave of Indian attorneys. My first law school professor on Indian law is sitting up there next to you. In a pre-law program, Alan Parker taught the summer before I started law school.

I have served, before becoming a State court judge, about 8 years on a part-time basis with tribal courts on both the trial and appellate level throughout Arizona, Utah, Montana, and into Colorado. I'm a member of the National Indian Court Judges' Board of Directors and the president of the National Indian Justice Center.

I've been asked to talk a little bit about tribal courts and come up with some concrete suggestions on how to improve tribal courts.

I fully believe, and agree with what I've heard the other panel members say, that tribal courts are by and large remarkable institutions given the longevity that they have had. U.S. court systems have had over a 200-year legacy, and that's if you discount British traditions that they built upon. Tribal courts, on the other hand, are successors to courts of Indian offenses and the Indian agents from the last century. They came into existence built upon the distrust of tribal and Indian notions of justice. They derive most of their authority now from the 1934 Indian Reorganization Act, both for the tribes that adopted tribal constitutions and those that did not.

Those constitutions were drafted by the Bureau of Indian Affairs and given to the tribes to ratify, and those constitutions provided most of the authority on the reservations to the tribal councils.

There are approximately 150 different tribal courts in the country, and about half of those are new since 1970. So we're talking about relatively young courts. We're talking about courts with different strengths, different weaknesses, based on where they are and what size they are. There are small courts—for example, in the Northwest—where the caseload is limited to such an extent that they do not have a full-time judge. There is a circuit-riding judge who goes from reservation to reservation, who's required to be familiar with many different tribal codes.

There are medium-sized courts; for example, at Ft. Hall in Idaho, Ft. Duchesne in Utah, and Umatilla in Oregon that have several full-time judges, full-time clerks, and basic equipment. They deal with between 1,000 and 10,000 cases a year with very limited resources.

Then there are the large court systems such as Navajo that this conference has heard about from Justice Tso yesterday. They have many judges, as well as a full-time appellate system. The Navajo court system dealt with over 45,000 cases in 1985 in several locations with very formalized procedures. They have a tribal bar exam. They have a well-established advocate program as well as law- trained lawyers who practice there.

The locations of tribal courts vary tremendously from being relatively isolated to those in suburban areas that are surrounded or engulfed by non-Indian communities. A number of tribal courts have well-developed advocate systems. An advocate system is basically a non-law-trained person who is given some trial skills and some substantive legal skills. An advocate then assists people, both tribal members and non-members, with the court process, so that they can participate in it fully.

Now there are a couple of goals that I think tribal courts are especially well suited to meet, and that includes the development of a true community type of a court system where the community then tries to resolve problems, either legal or social problems, within the community. They do that by trying to preserve or balance traditions and customs, what Justice Tso called yesterday "tribal common law," with the formal procedures that the non-Indian court system expects.

They attempt to deal with a solution to problems more than the declaration of a winner. One of the criticisms that I have heard and I have seen of non-Indian court systems is that they are not so much forums of justice as almost a throwback to the old gunfighter days of who had the fastest gun. Thereby provide the most paperwork to inundate the other side, who can declare a winner. Tribal courts, by and large, are more concerned with solving a problem and less concerned with declaring a winner. They do that basically by adapting — not adopting, but adapting—non-Indian legal concepts to fit the tribal communities.

One example of that is a pre-trial system for mediation of disputes. At Ft. Duchesne in Utah the litigants are called in to sit down with the judge and talk about a resolution of their case, and lawyers are not allowed in that pre-trial conference. Litigants are told they can bring their lawyer with them. Whenever they like, they can step outside and consult with the lawyer, and they're advised to do that before they actually enter an agreement. But at

the pre-trial the court can only order consent decrees where both sides agree on how to resolve the problem.

The purpose of that is recognition of the fact that the problem belongs to the litigants. The lawyers are there to do battle. The litigants are there to solve the problem. So if the problem can be resolved, that's wonderful; if it cannot, then it gets transferred to another judge who hears it in a typical adversarial type of proceeding.

Pre-trial mediation has resolved half of the civil claims and over half of the criminal actions that were brought in that tribal court, and that's done by trying to solve a problem rather than declaring a winner or loser.

Independent, ethical and professional courts is another goal that's within the grasp of tribal court systems. We recognize that there are problems with separation of powers. It has not been built into the tribal courts systems in many places, but it was still a struggle even for the U.S. court systems in their infancy. That's where *Marbury* v. *Madison* and the other cases come from—the struggles between the courts and the legislative and executive powers.

Tribal courts are going through that same kind of a struggle, and ways of trying to resolve that problem include educating tribal councils and judges both about their respective roles and making sure that counsels understand that their role is to legislate, to pass the laws, and the role of the court is to interpret and apply those laws. The two should not be into each other's game or in each other's area of expertise.

Tribal courts need to be recognized as having the right to interpret and apply law, including the Civil Rights Act. I think case law is sufficient to show that they do. There have been a number of cases that I have sat on dealing with civil rights claims against council members where the court has found that injunctive or declaratory relief is appropriate to solve the problem.

Sovereign immunity bars money damages, but not injunctive or declaratory relief, by either ordering an election set aside, not honoring recall petitions, or resolving whatever the problem is.

Lack of resources has become a real problem with tribal courts. We expect a great deal of them with very limited resources. Tribal courts are hoping that this Congress will allocate money to accelerate their development, recognizing that for the most part the tribes that they work with do not have a taxing base from which to fund tribal courts. State courts are funded out of the tax base. Local courts are funded out of the tax base. Tribes do not have that kind of ongoing, established tax base to fund their courts. The only way they can provide the resources, expertise, and personnel is by having Congress allocate those resources, at least until we reach the point that tribes are able to tax their own citizens and the activities within the reservation development of these courts require the establishment of an independent, ongoing resource for those courts.

Continuing legal education needs to be prioritized just as it is in the State court systems. Tribal judges need to be able to learn on an ongoing basis. Independent, professional assistance has to be available to those tribal judges, and we're not talking simply about

young law school graduates; we're talking about lawyers with courtroom experience, with constitutional law experience, that those judges can then draw upon, not to make their decisions for them, but to guide them with the principles that need to be applied.

These types of resources are not available in many parts of Indian country. Tribal judges are basically marooned, left to do the best that they can do. I think they're doing remarkably well given the amount of resources that they have at their disposal.

Career positions need to be established in the tribal courts. It cannot be viewed as simply a stepping stone to either political office or a higher-paid administratorship of some department. We need trained clerks, advocates, administrators, and judges to stay in the court systems. Their experience must remain as a resource for the continued development of tribal courts. Everything they learned can then be multiplied by the people that they teach. If they leave the court systems, that resource is wasted. To preserve that, tribal personnel in the court systems have to be paid appropriately; there must be inducements to keep them there, such as retirement programs. The State and Federal governments and the private sector have already learned that retirement programs are a good way to keep valuable resources in place. I don't know of a single tribal court that has that kind of program in place to keep the resources available and alive.

Certification, evaluation, and the followup assistance must be provided to tribal judges and staff so that weaknesses are identified and that remedies are put in place to correct those weaknesses. I'm not under any elusion that tribal courts are perfect, but I think they are doing remarkably well given the length of time they've operated and given the amount of resources they've had. I think a fair-minded evaluation, coupled with a program to remedy the ills that are found, the deficiencies that are found, is appropriate.

I think tribal courts are the institution where civil rights claims need to be resolved, where the local people understand what the issues are and they understand then what the solutions are. One of the worst things that I've ever seen in my years of practice has been, removing tribal problems from the reservation setting and placing them in the foreign environment of a Federal court. For example, there are sexual abuse cases on a reservation, where the defendant has been hauled 400 miles away from home, and away from the community that had the problem, to be tried in front of a non-Indian jury in Salt Lake City in Federal court. That kind of a problem needs to be resolved at home.

The civil rights problems also need to be resolved at home. That does not mean necessarily that they will be handled by political hacks or by other people who are controlling the court systems. I think tribes and tribal courts have demonstrated, in any number of cases that I'm personally familiar with, their commitment to resolve those civil rights disputes.

At Northern Cheyenne in Montana I was called out to resolve an election dispute on a one-time basis, no ongoing relationship with any of those people. But I was a law-trained Indian attorney with judicial experience, and they had me come up and resolve that election dispute. They could very easily have tried to manipulate a

local judge, but they chose not to do that, but to bring in an outsider with hopefully some level of expertise to resolve the problem.

At Fort Belknap, another reservation in Montana, they brought in three law-trained Indian judges from outside to resolve their election disputes. At Fort Duchesne they brought in three outside judges to resolve a membership dispute involving money damages against the council. Again, they did not attempt to manipulate the system; they brought in outsiders to resolve that dispute who are sensitized to Indian concerns and issues.

Fort Hall in Idaho has had any number of election disputes, and they have always brought in an outside law-trained judge to resolve those, not wanting either side to worry about even the appearance or the allegations of manipulation by councils.

I can go on and on with examples of that kind of commitment to fairness and to justice. Our goal should be polishing tribal courts and fine-tuning them. I think they've come a tremendous distance and they need to have the finishing touches put on. We're making more and more complex demands upon tribal courts, and yet we're not giving them the resources to deal with those demands. They've come such a long way in a short period of time, and we need to accelerate that kind of development, to correct the roadblocks or the tarnishes that have appeared.

But in my years of practice as a trial attorney, there are some State and Federal court judges that I would not want to appear in front of, just as there are some tribal judges I would not want to appear in front of. But the solution is not the abolition or even the overhaul of the system so much as cleaning or polishing the tarnishes that may appear.

We have to remember that surgery should be a last resort whenever a patient is ill, and that amputation of a valuable limb is appropriate only as a last resort. I think we're far, far away from that kind of a last resort. I think tribal courts are, by and large, healthy and simply need some aid and assistance to accelerate their development.

Thank you.

The CHAIRMAN. Thank you very much.

I've been advised that Professor Getches has a plane to catch, so if I may call upon you now, sir.

STATEMENT OF DAVID H. GETCHES, PROFESSOR OF LAW, UNIVERSITY OF COLORADO SCHOOL OF LAW, BOULDER, CO

Mr. GETCHES. Thank you, Mr. Chairman.

I am David H. Getches. I'm a professor of law at the University of Colorado Law School. I appreciate very much the opportunity to address this committee and join in thanking you for providing this hearing and for such attentive consideration to all of us as witnesses.

I'm here today as one who has studied, written, litigated, and taught Federal Indian law for many years. I was the founding director of the Native American Rights Fund, and following that, 10 years ago, I was project coordinator for the National American Indian Court Judges Association in a long-range planning project which produced this book, "Indian Courts in the Future."

The recommendations in this 1978 report have been partially implemented. The period since 1978 in the Indian country and the Indian justice systems has been one of quiet and determined improvement. It's been a period of impressive gains but, at the same time, Indians and their governments have experienced a phenomenon created by the courts and Congress—a positive phenomenon. It has been the period of the greatest expansion in recognition of tribal sovereignty in the history of Indian affairs.

There has been a host of new Federal laws, court decisions, and recognition by the Executive branch that have freighted responsibilities on Indian courts. The *Martinez* decision has been mentioned by others. It limits the Federal enforcement of the Indian Civil Rights Act, putting a burden, an appropriate burden, on the tribal courts. The U.S. Supreme Court and other Federal courts have bolstered tribal regulatory actions over both Indians and non-Indians. They have authorized the taxation of Indians and non-Indians, including multimillion dollar enterprises. The courts have also underscored the exclusive authority of tribal courts in civil disputes between Indians and non-Indians.

Now Congress during this same period has passed laws like the Indian Child Welfare Act, which provides exclusive jurisdiction to tribes over the placement and adoption of Indian children. Environmental regulation has expanded geometrically with the enactment and amendment of provisions to virtually all of the environmental laws, so that Indian tribes are treated like States. And tribes have risen to all of these challenges. They're enacting codes; they're enforcing laws; they're regulating their own land, their wildlife, their water; and they're administering justice on their reservations.

At the same time, the Supreme Court very recently has begun to lay some ground rules under which non-Indians may challenge Indian court decisions. First, Indian tribal courts decide whether they have jurisdiction and then, once the Indian courts assert jurisdiction and decided a case, the Federal courts may reveiw the jurisdictional decision.

All of these things add up to a conclusion that tribal courts are challenged as never before.

In addition to urging the continuing viability of many of the recommendations in the 1978 report, a copy of which I will make available to the committee, I'd like to offer four recommendations for possible congressional attention. The first of those recommendations is that a tribal judicial institute be established. That judicial Institute would have two functions, the first of which would be to provide resources and support services for Indian courts throughout the country. You heard from Mr. Joe Myers who heads the National Indian Justice Center, a very similar name. It's conceivable that that center could be expanded. A non-profit entity outside of government should provide training assistance; evaluate courts; provide independent legal advice; set standards for court operations, administration, bar admission; propose a uniform judicial ethics code; and come up with standard procedures for data collection; and provide publications. All of these things are essential for a good operating court system.

At this point the National Indian Justice Center is doing a superb job, but it cannot do all of the needed functionswith its present funding and a limited contract. In order to establish a more extransive institute, first, we need to have adequate funding and, second, a broader mission.

An important function that I would suggest for the tribal judicial institute as I have called it is to provide a funding formula for the Bureau of Indian Affairs' funding of tribal courts. At this point funding for tribal courts is part of a system wherein tribes rank the budget items that are the most important to them, and court systems are treated like another program, like day care or economic development or oil and gas contracts. They should be taken out of that system. A formula should be followed so that there is a reliable baseline of funding that doesn't fluctuate with the vicissitudes of tribal politics.

The second recommendation is that the criminal penalty jurisdiction of Indian courts be increased. The Indian Civil Rights Act, as the committee knows, in 25 USC section 1302 (7) places a limitation of $5,000 or 1 year on penalties imposed by tribal courts for criminal offenses. The limits were wisely increased to these levels by the Congress in 1986 from the previously very low limits.

The reasoning behind the change found in the legislative history was to enhance the ability of tribal governments to penalize the trafficking in illegal narcotics on Indian reservations. There are much greater reasons for expanding the criminal jurisdiction. At this point, crimes of all kinds go unpunished including violent crimes, and the safety of people on reservations is jeopardized. This is largely because of the high prosecution declination rate of U.S. Attorneys under the Major Crimes Act and assimulative crimes act. At the same time the U.S. Supreme Court has concluded that limits on tribal penalties essentially deprive Indian tribes of the jurisdiction they need to deal with serious crimes. To repeal the limitation would be to restore matters to the way they were 20 years ago, before the Indian Civil Rights Act. Prior to 1968, there was no record of abuse of tribal criminal penalty jurisdiction which I am aware. Courts have dramatically improved since they then, and one could expect that they would deal with responsibly.

The third recommendation I offer is enabling legislation for a tribal State cooperative jurisdiction act. At this point it is not possible for a county and a tribe or a State and a tribe to agree—for instance, for the tribe to take over misdemeanor criminal jurisdiction over non-Indians. That agreement might have been concluded between the tribe and the State of Arizona had it been possible that the criminal defendant controls this world of personal jurisdiction. Because of Public Law 280, tribes and States cannot enter into agreements allocating personal jurisdiction.

My fourth recommendation is that Congress encourage the Bureau of Indian Affairs to eliminate less than a score of CFR courts that remain. This would be an important symbolic and substantive gesture. It would lay to rest an anachronism. It is important in the revitalization of self-government for those tribes involved and it's important to all tribes to see the day of paternalistic control of Indian life and values under a Federal regulatory system ended.

Congress can do a great deal in Indian affairs. The Supreme Court has told us that the limits on congressional powers are virtually nonexistent. The doctrine of plenary power allows treaties to be abrogated and tribal governing powers to be divested. The question is not one of power, but what is the appropriate solution if there are problems in Indian justice.

One solution, of course, would be to curb powers, to eliminate entire court systems. But is that the solution suggested when there is anecdotal evidence of abuse of civil rights of individual Indians by non-Indian county court systems in a town bordering the reservation? Is that the solution we hear when we learn that the courts of Texas have had their decisions influenced by campaign contributions to judges who sat on the cases? The appropriate solution in those cases are to work within the system to improve it. That is precisely the kind of solution that is apt in the case of Indian courts. Before assuming that we should cut the deep, historical roots of Indian sovereignty, it should explore ways to strengthen those roots.

Thank you.

[Prepared statement of Mr. Getches appears in the appendix.]

The CHAIRMAN. I thank you very much, Professor. I thank you for your participation this week.

I would like to now call upon the Chief of the Judicial Services of BIA, Mr. Joseph D. Little.

Welcome, sir.

STATEMENT OF JOSEPH D. LITTLE, CHIEF, JUDICIAL SERVICES, BUREAU OF INDIAN AFFAIRS, WASHINGTON, DC

Mr. LITTLE. Thank you, Mr. Chairman. I'll make my comments brief, not because the subject itself should be dealt with in this fashion—it is a very important area that has to be covered in length—but I think because most of the panelists have covered many of the issues more than adequately up to those point. I would also like to leave time for the questions involved, so, therefore, I will try to be brief.

I have submitted a written statement and I would like to just read off of that and elaborate in a few areas.

There are four major areas that need to be addressed in strengthening evolving tribal court systems, and the areas are funding, training, recordkeeping, and appellate systems. Now this is to say already that we think the Bureau feels that tribal court systems do have to be—are a very major and intricate part of tribal governments and hope that they evolve to that, to where they should be.

Under the funding, the Bureau has addressed the tribal court funding process before this committee in 1987. As noted at that time, a major concern is that court systems continue to maintain adequate minimum operating budgets. One approach to this problem would be to establish a base funding level outside the Indian priority system. Such an option is under consideration within the Bureau and could be one way of assuring that funding continue to meet the needs in this area. Any changes of this nature would, of

course, technically require a budget structure change and would be addressed within the budget and appropriation process.

I might explain that we do not see that necessarily dealing with the Indian priority system or putting court funding outside the priority system is the only way of dealing with it. We do understand that there are problems with how the tribes would view this, and we're not attempting to do anything unilaterally. However, we are suggesting that this is one way of dealing with it. We would more than welcome any other method the problem being that tribal court systems—and this is over 90 percent of the tribal court systems—are federally funded, and these Federal funds are provided through Public Law 638 contracts. Now in doing this, these moneys fall into the normal Indian priority system pool throughout Indian country, and we think it's very unfair to the tribes and very unfair to the court system to put them in a situation where they are vying, if you will, with other very necessary needs of the tribal communities.

The other problem is that once a tribal court system builds up and gets a good, steady base, it is very detrimental to have that base eroded by having your funding levels changing on you. It's very difficult to go backwards and then try to make up again. We'd like to see some way of stabilizing that minimum funding and then improving on top of that with the court systems, so that they will always have some stability within them.

With regard to the training, the Bureau wishes to provide adequate tribal court training. A primary concern has been our capability to meet evolving court personnel training needs and provide reviews of court systems resulting in recommendations for more effective judicial systems in Indian country. We are also concerned with providing onsite technical assistance and training to implement easier access to information for tribal court systems. The Bureau intends to further address these objectives in future budget proposals.

To meet some of these concerns, the Bureau is attempting to implement some of the recommendations made in 1980 by the American Indian Lawyer Training Program in conjunction with the National American Indian Court Judges Association entitled, "Tribal Justice Center Concept." Some of the recommendations from the document currently being implemented through the Branch of Judicial Service include providing additional court personnel training, onsite technical assistance, and reviews of court systems.

Professor Getches, I believe, alluded to a tribal court center that was a concept that was being circulated, a system outside the normal Bureau system. This was envisioned in this document, which would develop a judicial center that would provide many of the support services and be independent, if you will, of certain constraints.

The idea is very much similar to the National Federal Justice Center and the State Justice Center, both of which are federally-legislated operations and do operate outside normal other constraints. The Bureau at this time is actually attempting to do that, but within the administrative framework. The concept that was proposed by the Indian Court Judges Association was to be legislated and, for whatever reasons, never really got going. We are not

adverse to that idea; we're just saying that at this point in time we are trying to pursue it within the administrative framework. We think it's a good idea and the Bureau would like to accomplish something along those lines. We are not locked into whether it should be under an administrative setup or whether it should be under a legislative setup. We're more than open to suggestions on either end.

Obviously, we'd like to hear some recommendations from the judges. In that line, we're trying to set up a conference with them in May to discuss some of these issues and get some recommendations from those judges to see which way they would like to pursue the Judicial Center.

With regard to recordkeeping, it is important that the tribal court systems be recognized as courts of record. This is not only important in aiding the tribes in developing an accurate record of court proceedings, but may aid courts in achieving reciprocity from the State court systems. Conforming to such record systems also allows analysis of court activities that can identify needs or trends that can then be more readily addressed by the Bureau, or whatever other system is devised.

Appellate systems—the Bureau is also concerned with providing an effective appellate system for tribal courts, particularly in the area of addressing procedural issues and providing more effective judicial review. A primary concern is to fill the need for written opinions that can serve as a basis for articulating concepts of equal protection and due process within Indian country. In this regard, the Bureau is aiding the development of two or three multi-tribal appellate systems during fiscal year 1988 on a somewhat experimental basis. That's not to say this will be one time funding, but it's to say that we would like to make the opportunity available to some tribes who would like to be interested in setting up intertribal appellate court systems, and if they do want to do that and continue to do it, we would be more than willing to attempt to continue the funding for that process. But, again, we are still in the process of approaching these tribes and asking if that's really what they want to do.

We have got some consensus from the Northwest and looking at doing that, and we would like to do it on a regional basis. We will be doing that in the next few months.

Thank you, Senator. I'm open to any questions.

[Prepared statement of Mr. Little appears in the appendix.]

The CHAIRMAN. Thank you very much.

Our final witness on the panel is Ms. Susan Williams of Albuquerque.

Ms. Williams.

STATEMENT OF SUSAN M. WILLIAMS, ATTORNEY, GOVER, STETSON & WILLIAMS, P.C., ALBUQUERQUE, NM

Ms. WILLIAMS. Thank you, Mr. Chairman. I want to thank you for your agreeing to convene this hearing and also thank you for your personal attention to these very important matters this afternoon.

I will be quite brief in my remarks. Essentially, I want to say that I was raised on an Indian reservation. My family, with very few exceptions, today lives on Indian reservations throughout the country. I have been representing Indian tribes now as legal counsel for approximately 7 years. I have prosecuted cases and defended cases in tribal courts. My family has been both defendant and plaintiff in tribal courts, and I even once was compelled to appear in a tribal court due to a case of mistaken identity.

Tribal courts today, Mr. Chairman, are faced with new and challenging demands never before experienced by the tribal court systems. In addition old, systemic problems continue to plague tribal courts, and I would like to talk briefly about in these two aspects.

With respect to the new and challenging demands facing tribal courts, as a result of Supreme Court decisions in the last 5 years, Indian tribes have really emerged from the Indian Reorganization Act aftermath to a new day of functioning as modern tribal governments exercising full civil regulatory powers over both members and nonmembers on the reservations.

In that connection, our firm has been involved with numerous tribes throughout the country in developing civil regulatory laws including taxation codes applicable to both Indians and non-Indians on the reservations, very complex environmental codes which have gotten a boost recently with the enactment of the Safe Drinking Water Act amendments and the Clean Water Act amendments permitting tribes to be funded for their environmental activities. Many tribes are enacting hunting and fishing codes, zoning codes. We're working on a hazardous waste code for a particular tribe.

In each of these instances there typically is an appellate structure consisting of an administrative appellate branch with appeals taken to the tribal courts. The sanctions that are possible include interest, penalties, enforcement actions and even suspension of business activities rights on Indian reservations for failure to pay tax or comply with these laws.

These are new challenges facing tribal courts. There are very significant rights at stake and typically very complex matters which tribal courts are being asked to address in these contexts.

But perhaps even more importantly, Mr. Chairman, in an area which you are personally, very supportive of, and we very much appreciate your interest in, of course, is that of economic development. Our firm is involved in trying to put together numerous transactions on Indian reservations. Typically we find ourselves faced with having to go to non-Indians either for debt or for equity financing or for participation in these transactions as managers, or even in some cases employees of these tribal governments who are taking the lead role in promoting development on the reservations.

In each of these instances I typically am faced with a comment by a non-Indian legal counsel that we are willing to do business on these Indian reservations provided we do not have to have disputes arising under these transactions litigated in the tribal courts. There is out there a very negative perception and fear of tribal courts that is unfounded in my belief.

The reality of the situation in tribal courts in adjudicating disputes arising in economic development is that there really is no right for these non-Indians to take tribes or tribal members into

State or Federal courts. These courts lack jurisdiction. Without repeating the law around that, I'm sure there has been for the record, presentations of the law concerning the absence of State court jurisdiction over transactions arising on Indian reservations and the absence of Federal court jurisdiction over transactions arising on the Indian reservations, which law has come from Supreme Court decisions beginning in 1959 with *Williams* v. *Lee, Kennerly* v. *District Court* in 1972, and most recently, in 1985 and 1986, with *National Farmers Life Insurance* v. *Crow Tribe* and *Iowa Mutual Insurance Co.* v. *LaPointe.* It's absolutely clear that for those transactions which occur on Indian reservations of a business nature, tribal courts really are going to in the final analysis be the forums in which disputes will be adjudicated

These, Mr. Chairman, are new challenges for tribal courts. The transactions that they will be adjudicating involve anywhere from a very small, $200,000–$250,000 project to a $450–$500 million project, such as one that we are involved in currently for a tribe in Southern California.

In facing these new challenges, tribes are dealing with some very old and systemic problems that have been enumerated here by the many witnesses this afternoon. Those problems are attributable to lack of funding for training of the tribal court judges. Salaries are far inadequate for the kind of people that we would like to attract and maintain in these positions. These are old, systemic problems, the answer to which is increased Federal support and funding for the tribal court system.

Without tribal courts having an ability to fairly and competently resolve disputes in the economic development arena, I maintain that economic development in a real sense will not occur, will not be promoted, and will not be sustained on the Indian reservations. Tribal courts play a critical role in promoting economic development on the reservations.

As to the old problems, Mr. Chairman, they're old problems that we've heard a lot about. The U.S. Civil Rights Commission has been quite forceful in enumerating the so-called many abuses on the Indian reservations of tribal governments and tribal courts, abuses of the Indian Civil Rights Act. Mr. Chairman, in my long association with Indian tribes, Indian tribal governments, and the Indian tribal courts in particular, I can confidently say that those abuses are very few. Where those abuses exist regarding human rights or civil rights, in my mind they arise not from bad faith on the part of the tribal leaders or the tribal court judges, but rather the inadequate training of these judges, and oftentimes I find these abuses arising from misconstruction of Federal law or tribal law due to the lack of training of the tribal court judges or the inadequate funds with which law school graduates can be hired to serve as law clerks.

I honestly believe where there is adequate training over a period of time training that's being provided initially by the Indian Court Justice Center here, training in tribal jurisdiction, tribal sovereign immunity and how sovereign properly is waived, training in interpretation of tribal statutory enforcement and interpretation of contracts—these are all very complex matters that I believe are the

deserving subjects of extensive training of the tribal court judges that will alleviate the so-called abuses in Indian country.

Now there are, of course, instances where there are, in fact, abuses due to fraud or bad faith. In those instances, Mr. Chairman, I believe the solution is not Federal legislation, but rather for the tribal people themselves, through their own political processes, to remedy those situations, and I have one example to cite for that proposition.

In 1974 the United States Supreme Court decided the case of *Santa Clara Pueblo* v. *Martinez*. In that case an Indian woman claimed that the tribal government unfairly excluded her from becoming a voting member and an elected leader of that tribe. Of course, the Supreme Court of the United States held that it was the tribal government that had to remedy that, not the Federal courts, pursuant to the Indian Civil Rights Act.

The Santa Clara Pueblo is in New Mexico today, you see a Pueblo woman governor, I think as a direct result of the Supreme Court's giving the tribes an ample opportunity to decide for themselves through their own internal processes that have been going on for thousands of years the appropriate role of women and the appropriate role and definition for that matter of civil rights and human rights on the Indian reservations. I think the election of Verna Williamson as Pueblo Governor of the Pueblo of Isleta recently is a perfect example of the tribal processes being allowed to run on their own and being allowed to run effectively.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Ms. Williams.

When I accepted the responsibility to chair this committee 1 year ago, I suggested that one of the most important responsibilities that this committee has is the protection and maintenance of this unique sovereign relationship that exists between the United States and Indian nations, and to that end we have tried to address our legislation.

I have also contended that the real cutting edge of this unique sovereign relationship is the Indian judicial system. If you strengthen that system, you strengthen the tribes. If you weaken it, you weaken the tribes. The well being of your judicial system will affect the well being of the tribe.

Therefore, I have been concerned, like many of you, at the attempt—the clear attempt—on the part of the U.S. Civil Rights Commission to overturn the *Martinez* decision. I am also concerned about the possible effects of the magistrate bill. I am additionally concerned about the attitude of the U.S. Government as articulated in a letter that I received from the Justice Department relative to the so-called *Sohappy* case.

As some of you are aware, the vice chairman and I made a special journey to the White House to meet with the President's Chief of Staff and the Attorney General to discuss the *Sohappy* matter because both of us felt that the time had come to release Mr. Sohappy.

The Justice Department responded to this with a most surprising suggestion. Among the suggestions was, one, that before Mr. Sohappy is released, the Yakima Nation would have to publicly pledge that they will uphold the laws of the United States.

It is inconceivable to me to envision a situation where the Justice Department of the United States would send the same type of letter to another sovereign entity, a State. Imagine the governor of any State receiving a letter that we will release one of your men if you would pledge to uphold the laws of the United States. I can imagine the response of that governor. But, here we have a letter of this sort being sent to the chairman of the Yakima Nation.

I think that all of these matters should be of grave concern to all those who believe that this sovereign relationship should be maintained and protected, because if we permit the overturning of the *Martinez* decision, if we let this Sohappy suggestion be carried out, you will have very directly weakened this sovereign relationship.

Therefore, I have the following questions: all of you have, in one way or another, suggested that the way to strengthen the court system is to properly fund it. In fiscal year 1987 we appropriated $11,196,000. Mr. Little, how much did BIA request at that time?

Mr. LITTLE. I think the figure for direct funding to the tribal courts was a little over $9 million. The difference on the two is what goes into our operation here at Washington, which provides moneys over and above to help out court systems that need it, what we call needy tribal court systems.

The CHAIRMAN. Is that the amount you requested?

Mr. LITTLE. We had requested in the 1988 budget $2.3, I believe, for our operations here for providing training and whatever else. The $9 million that was requested I believe was also requested. I think it's pretty close to the request we made.

The CHAIRMAN. You requested the same amount and, yet, you know that in fiscal year 1985 the tribal courts handled 185,000 cases and in fiscal year 1987 the cases rose to 230,000. That being the case, don't you think it takes a few more dollars to handle that increase?

Mr. LITTLE. That would be the obvious conclusion.

The CHAIRMAN. How did you respond to the requests made by the various tribes and nations?

Mr. LITTLE. The problem we have with the system there is, as I pointed out earlier, that $9 million is distributed through Public Law 93-638 contracts, so the requests for the moneys coming up for the next upcoming year is developed at the area office levels in conjunction with the tribes. So those are basically requests coming from the field.

The CHAIRMAN. Before this panel began its presentation, if you recall, I submitted for the record a letter dated December 9 from the Civil Rights Commission to Secretary Hodel. In that letter the Commission submitted a very extensive list of questions. Are you aware of this?

Mr. LITTLE. Yes.

The CHAIRMAN. Have you developed answers to these questions?

Mr. LITTLE. Senator, we are in the process of doing that.

The CHAIRMAN. When you do, would you supply this committee with a copy of the responses?

Mr. LITTLE. Yes, Senator.

[Material to be supplied appears in the appendix.]

The CHAIRMAN. I think it would be extremely helpful.

The Department also proposed to fund the operation of I believe at least two intertribal or regional appeal courts in fiscal year 1988?

Mr. LITTLE. Yes, sir.

The CHAIRMAN. Where do you propose to locate them?

Mr. LITTLE. The three sites—and these are based mostly on geographic considerations at this point as well as systems that are already somewhat operating to work with it. The Northwest is one area which has a number of small tribes and is very ideal for that kind of an operation. They've also given us an interest in doing that.

The CHAIRMAN. Where in the Northwest?

Mr. LITTLE. It would probably be based out of the State of Washington. It would cover many of the tribes in the Portland and Washington areas. We are working through the Northwest Indian Judges Association I think, which covers a large portion in that area.

The other site that we are looking at is possibly something in the Montana area, what we would consider the Midwest tribes, if you will. There is already an intertribal appellate system serving some of the South Dakota tribes, some several Sioux Tribes, which we currently fund directly. We are interested in maybe funding that even at a higher basis to upgrade that system.

The third site is somewhere in the Southwest. For no other better reason than saying these are regional, we have to go out and check with the tribes and see if they are really interested in doing this. We have already gotten some indication, but we haven't formally said, OK here we go; let's do it. So we are, again, in that process. It could be conceivable that in one of these areas the tribes are not interested in doing it, and then we'd shift it to some other location.

The CHAIRMAN. I'm certain that all of you realize that in the funding of the court system the Federal Government appropriates in this case $11.2 million, roughly; the request submitted by the Bureau would be rather similar to the one that we just approved recently. The rest of the money is from the trust resources of the various tribes and nations.

What would you think would be a reasonable, appropriate amount that should be funded from the Federal level? Mr. Little said that $2,300,000?

Mr. LITTLE. $2,300,000.

The CHAIRMAN. For your operation?

Mr. LITTLE. Yes, sir.

The CHAIRMAN. $9 million for field operations?

Mr. LITTLE. Yes, sir.

The CHAIRMAN. I presume $2.3 million would be sufficient for BIA operations. Would $9 million be sufficient for the field operations?

Mr. MYERS. I don't think $9 million is sufficient. I don't have real accurate estimates for you at this time, but just offhand—and I think Joe Little would want more in the budget if that were possible. I don't think that he's been remiss in not obtaining more, because of the deficit and the cutbacks, and so forth. At this time of course, $9 million is inadequate because I think that there needs to

be this formula that David Getches alluded to earlier with regard to categorizing tribal courts by reservation size, population, caseload capacity, staff members, and jurisdiction. Those ingredients must go into a formula so that you could have several categories of tribal court funding at base levels and other special projects developed from that.

I think Joe Little is working on that formula. It hasn't been designed and completed yet, but I think that is the next step in order to have accurate budget designations in the future.

I think if you look at the $9 million, there are some tribes that can subsidize the budgets of their tribal courts, but not all. I know, just as an example, the Acoma Pueblo exists on something like $52,000 as far as the BIA budget is concerned, and that is for a judge, a court clerk, a probation officer, two court clerks, and a bailiff. This $52,000 is less money than what a judge makes in the New Mexico court system. So it is way out of line.

Another note is that the judge of the Acoma Pueblo is an attorney, licensed in New Mexico. He should be eligible for that kind of salary that New Mexico pays their judges.

If you doubled the $9 million to $18 million, I do not think the needs would have been served.

The CHAIRMAN. We will be studying the priorities list of the various tribes and nations.

Mr. MYERS. One other comment, Senator, concerns the band analysis system, noted by Mr. Getches. I think tribal courts need to be taken out of that system so that they don't fight for program money at the local level and politics do not play a part in the budgetary consideration of tribal court funding.

The CHAIRMAN. Mr. Myers, one of the questions or issues raised by the Civil Rights Commission is whether tribes should be compelled to make legally-trained attorneys available to defendants in tribal courts. What is the available pool of attorneys at the reservation level, and would it be practical to require tribes to provide such counsel?

Mr. MYERS. I think at the time the Indian Civil Rights Act was passed into law, according to the legislative history there was a great concern that if attorneys were provided at the tribal government's expense, that it would be a tremendous burden on the financial resources of tribal governments. So that's the theory behind the uniqueness of that provision in the Indian Civil Rights Act that says you can have an attorney at your own expense.

Now that's Federal law that's drafted, and a certain perception looked upon in terms of what the needs were at that time for Indian tribes. I think that it would be burden. However, if the Federal Government would participate in funding attorneys at the local level, sure, I think they should be provided.

However, let me also say that there are tribal court advocates who know the law very, very well in the court systems throughout Indian country. In fact, there are tribal court advocates on some reservations that practicing attorneys in the State jurisdiction don't care to come up against in tribal court because these folks know the tribal law, the tribal customs, the traditions, and the language of the local tribal communities.

So there is that option. It has been there and used very effectively. But if the Federal Government would find a way to fund it, sure, but the Indian Civil Rights Act reads right now that a defendant in tribal court is to provide counsel at his or her own expense.

The CHAIRMAN. Judge Thorne, you are in a very unique position. You have practiced before tribal courts, and I presume you've practiced before State and Federal courts, and now you are sitting as a judge in the court of the State of Utah. So you have had experience in all of these courts. How do you think the tribes measure up to the enforcement of the Civil Rights Act in the tribal courts as compared to the enforcement of the Civil Rights Act in your court?

Mr. THORNE. I think they do very well. I think the tribal judges that I have been associated with are committed to fairness. I think that some of the speakers are correct that particular application of a law might be misapplied, but I think that's the exception. I agree with Ms. Williams that I don't think that I have ever seen it done maliciously or with the intent to deprive somebody of the rights that they're entitled to.

I see tribal judges, in fact, bending over backwards to make sure that litigants are afforded an opportunity to present their case. I see tribal judges very reluctant, for example, to rely on technicalities to throw somebody's case out of court. I see them, instead, making sure that the litigants have an opportunity to present their case, whether it's a case against the tribal council or it's a case against their neighbor. I see them working extremely hard to make sure that the problem is presented and then they try to come up with a solution to that problem. I sometimes think that State courts and Federal courts lose that sense of looking for fairness and justice in all the technicalities.

The CHAIRMAN. I think that approach is a much more sensible one, a much more democratic one.

To what extent do the courts of your State honor or enforce the decisions of tribal courts?

Mr. THORNE. I think that varies somewhat with the knowledge that the State judges have. Within the last 6 months is the first time even the State bar association has sponsored any kind of education about tribal jurisdiction. I think the judges are not as informed as they should be either. I think the judges who are aware of the jurisdiction—for example, the Indian Child Welfare Act—do very well at honoring tribal court decisions. But I think for the most part they are so unfamiliar with it that they view it as an alien kind of an institution, and I think that's unfortunate.

Since I have become a State court judge, a number of them have started to ask me about tribal courts. They know my background. They're sympathetic for the most part, although there are some that are philosophically opposed to tribal courts, but I think all of them uniformly lack the knowledge of what tribal courts are and what the legal basis for them are.

The CHAIRMAN. How would you suggest that we improve this situation, communicating information?

Mr. THORNE. I think a basic step would be providing information at judicial conferences. Utah and I believe most other States have annual judicial conferences to look at key questions. This last year in Utah there were 2½ days focused on child abuse. I think educat-

ing judges at the judicial conferences is one step that must be taken. I think approaching members of the various State supreme courts in different locations would be an excellent method of having them sponsor the education—it's tough for a judge to say no to a member of the State supreme court when invited to a conference on a particular subject.

I think education for the State bar association—that's where the members of the judiciary are drawn from—needs to be done. I think if there were some exchange, both formal and informal, between tribal judges and State judges on a one-to-one, personal basis, as well as on a more formal basis observing each other's systems—I think that would facilitate that kind of respect.

The CHAIRMAN. Do you have this sort of relationship at this time, formal and informal?

Mr. THORNE. For the most part, I don't think that's done. In the conference in the last 2 days we've heard about it being developed in Arizona and New Mexico to some extent, but I think, by and large, it is not done. I think that's unfortunate.

The CHAIRMAN. Ms. Williams, you are also blessed with that experience of practicing before tribal courts and State and Federal courts. I readily understand that there are some judges that you would prefer not to practice before and some you might love to practice before, but, taken as a whole, do you find yourself comfortable and assured when you practice before a tribal court that your client will get a fair trial?

Ms. WILLIAMS. Mr. Chairman, when tribal court judges are presented with cogent arguments by counsel, I believe that their sense of fairness will lead them to connect decisions, which I think is very preeminent nationwide in the tribal courts—I can't emphasize enough the feeling I get in going into the tribal courts that fairness really is dealt in tribal courts, given the right application of law.

If Congress in its wisdom were so good as to give them the money to hire the law clerks that every other judge gets in the State courts and the Federal courts, which they don't have available to them, I believe that the application of both law and the principles of fairness would assure in every instance that my clients, or any other people brought into the tribal court, would be confident and satisfied that they would get not only fair judgments, but judgments true to the law that governs the case.

I can say at this time that there isn't a deal—I represent Indian-owned businesses as well as tribal governments—and there isn't any one of my clients that I have ever advised to try to avoid tribal courts. I have advised them that tribal courts have jurisdiction and trying to avoid them makes no sense at all, and that the better approach to do is to appear in these tribal courts and to be just as respectful of those judges as they are respectful of State court and Federal court judges.

I have not in my entire 7 years of experience in the tribal courts ever had one of my clients treated unfairly in the tribal courts.

The CHAIRMAN. That is quite an endorsement.

How are these judges selected? Are they elected, appointed? What is the term of office?

Mr. MYERS. There hasn't been a study done recently, Mr. Chairman, but at one point there was data that put it about 50/50.

There are some elections, like Governor Rhodes talked earlier about recent elections at Gila River where a person who had been a court clerk for 10 years was elevated by election to the position of associate judge. So it is a mixture.

I think the real problem that needs to be addressed now and in the future is how we deal with credentials for running for office for judges in terms of elevating those credentials so that we can solicit more professionalism in the candidates. I think that the same has to be done with policies that certain councils use in selecting judges for appointment.

The CHAIRMAN. I thank all of you for spending time with this committee this afternoon. It has been most helpful.

The committee will hold its record open for the next 3 weeks. If you have any additional statements you would like to submit or addendum, please feel free to do so. If anyone in the audience would like to submit a statement concerning the matter before us, we would welcome that also.

[Material to be supplied appears in appendix.]

The CHAIRMAN. I thank you very much.

We will stand adjourned.

[Whereupon, at 5:13 p.m., the committee recessed, to reconvene at the call of the Chair.]

APPENDIX

Additional Material Submitted for the Record

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

TODAY THE COMMITTEE WILL BE RECEIVING TESTIMONY ON TRIBAL COURT SYSTEMS, THEIR DEVELOPMENT AND EVOLUTION OVER THE PAST ONE HUNDRED YEARS, THEIR RELATIONSHIPS WITH THE COURTS OF OTHER SOVEREIGN ENTITIES, AND THE MANNER IN WHICH THE PROVISIONS OF THE INDIAN CIVIL RIGHTS ACTS ARE APPLIED BY TRIBAL COURTS IN INDIAN COUNTRY. WE WILL BE ASKING OUR DISTINGUISHED PANELISTS TO PROVIDE THEIR PERSPECTIVES ON THESE ISSUES, AND TO PROVIDE THE COMMITTEE WITH AN OVERVIEW OF THE STATUS OF TRIBAL COURTS IN TODAY'S LEGAL SYSTEM.

IT IS WELL ESTABLISHED THAT INDIAN TRIBES ARE SOVEREIGN. THEIR EXISTENCE PRE-DATES THE UNITED STATES CONSTITUTION. AND ALTHOUGH THE TRIBES WERE NOT PARTIES TO THE CONSTITUTION, THE UNITED STATES CONSTITUTION ACKNOWLEDGES AND ESTABLISHES A LEGAL RELATIONSHIP WITH THE INDIAN TRIBES. THE LEGAL STATUS OF THE TRIBES WAS DESCRIBED BY THE SUPREME COURT AS EARLY AS 1831 AS THAT OF DOMESTIC, DEPENDENT SOVEREIGNS. TO THIS DAY, THE GOVERNMENT OF THE UNITED STATES MAINTAINS A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE INDIAN TRIBES.

THE CUTTING EDGE OF THE SOVEREIGN RELATIONSHIP BETWEEN THE UNITED STATES AND THE TRIBES IS THE TRIBAL JUDICIARY. IT IS IN THE TRIBAL COURTS THAT THE LAWS AND ORDINANCES OF THE TRIBES ARE

INTERPRETED AND ARE APPLIED TO THE FACTS PRESENTED. THE EXTENT TO WHICH THE FEDERAL AND STATE GOVERNMENTS ACCORD RECOGNITION TO THESE TRIBAL LAWS, AND THE DECISIONS OF THE TRIBAL COURTS -- THE EXTENT TO WHICH WE GIVE FULL FAITH AND CREDIT OR ACCORD COMITY TO THESE DECISIONS -- IS THE MEASURE OF OUR WILLINGNESS TO RECOGNIZE AND ACCOMMODATE THE SOVEREIGNTY OF THE INDIAN TRIBES.

BY THE SAME TOKEN, THE HEALTH AND WELL-BEING OF THE TRIBAL COURTS IS A MEASURE OF THE HEALTH AND WELL-BEING OF THE TRIBES. IF THE CAPACITY OF THE COURT IS DIMINISHED BY INADEQUATE FUNDING AND SUPPORT, IT IS THE SOVEREIGNTY OF THE TRIBE THAT IS DIMINISHED. IF THE AUTHORITY OF THE COURT IS DIMINISHED BY LACK OF REGARD FROM ELECTED TRIBAL OFFICIALS OR THE MEMBERSHIP OF THE TRIBE, IT IS THE STANDING OF THE TRIBE THAT SUFFERS.

THE ORIGIN OF THE TRIBAL COURTS, AS WE KNOW THEM TODAY, BEGAN WITH SECRETARIAL COURTS ESTABLISHED BY THE SECRETARY OF THE INTERIOR IN THE LATE 1800'S AS A MEANS OF MAINTAINING LAW AND ORDER ON INDIAN RESERVATIONS. IT WAS THROUGH THESE COURTS, AND THE INDIAN POLICE FORCES THAT WERE ESTABLISHED AT THE SAME TIME-- STAFFED BY INDIAN PEOPLE APPOINTED BY THE LOCAL BIA SUPERINTENDENTS -- THAT THE SECRETARY OF THE INTERIOR OUSTED THE U. S. ARMY FROM CONTROL OF THE INDIAN PEOPLE WITHIN THEIR RESERVATIONS. IT WAS ALSO THROUGH THESE COURTS THAT THE SECRETARY ENFORCED RESTRICTIONS ON TRIBAL CUSTOMS -- PARTICULARLY DANCES SUCH AS THE GHOST DANCE AND THE SUN DANCE THAT NON-INDIANS CONSIDERED TO BE THREATENING.

THE ORIGINS OF THE COURTS WERE THUS OF A MIXED NATURE. ON THE ONE HAND, THE COURTS WERE INSTRUMENTAL IN OUSTING THE HEAVY HAND OF THE MILITARY. ON THE OTHER HAND, AMONG MANY TRIBES THE COURTS WERE VIEWED AS A WHITE MAN'S INSTRUMENT FOR SUPPRESSION OF THE RECOGNIZED AUTHORITY OF THE TRADITIONAL CHIEFS OR TRIBAL GOVERNMENTS. EVEN TODAY MANY TRIBAL COURTS SUFFER FROM THIS DICHOTOMY OF VIEW AMONG THE INDIAN PEOPLE.

IN THE MID-1930'S, WITH ENACTMENT OF THE INDIAN REORGANIZATION ACT OF 1934, THE CONGRESS AND FEDERAL ADMINISTRATORS BEGAN TO RECOGNIZE THE DOCTRINE LONG ESTABLISHED BY THE COURTS, OF THE INHERENT SOVEREIGNTY OF THE INDIAN TRIBES. REGULATIONS PROMULGATED AT THIS TIME RECOGNIZED THE DIFFERENCE BETWEEN TRIBAL COURTS (COURTS CREATED BY ACT OF THE GOVERNING BODY OF THE TRIBE) AND COURTS OF INDIAN OFFENSES (COURTS CREATED BY THE SECRETARY OF THE INTERIOR, OR SECRETARIAL COURTS). TODAY MOST TRIBAL COURTS ARE EXACTLY THAT -- TRIBAL COURTS -- THOUGH SOME C.F.R. COURTS CONTINUE TO EXIST.

OVER THE LAST TWENTY OR TWENTY-FIVE YEARS, MAJOR EVENTS HAVE OCCURRED IN THE LAW AFFECTING THE INDIAN TRIBES AND THE TRIBAL COURTS. IN 1968, CONGRESS ENACTED THE INDIAN CIVIL RIGHTS ACT, SETTING FORTH A STATUTORY SCHEME OF THE RIGHTS OF INDIVIDUALS IN RELATIONSHIP TO THE TRIBAL GOVERNMENTS, PARALLEL TO THOSE FOUND IN THE FIRST TEN AMENDMENTS TO THE UNITED STATES CONSTITUTION. IN 1978, AFTER 10 YEARS OF APPLICATION IN THE LOWER COURTS, THE

SUPREME COURT HELD IN THE CASE OF MARTINEZ v. SANTA CLARA PUEBLO, THAT THE PRIMARY OBLIGATION FOR ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT LAY IN THE TRIBAL COURTS -- NOT THE FEDERAL COURTS. IN RECENT MONTHS, THE U.S. CIVIL RIGHTS COMMISSION HAS BEEN HOLDING HEARINGS TO CONSIDER WHETHER LEGISLATION SHOULD BE PROPOSED TO OVERTURN THE MARTINEZ DECISION. AS CHAIRMAN OF THE INDIAN AFFAIRS COMMITTEE, I AM INCLINED TO OPPOSE SUCH LEGISLATION.

IN 1978, CONGRESS ENACTED THE INDIAN CHILD WELFARE ACT, SPECIFICALLY RECOGNIZING THE JURISDICTION ALREADY FOUND BY THE FEDERAL COURTS TO BE VESTED IN THE TRIBES. THIS LEGISLATION CLEARLY DEFINED THE RESPECTIVE JURISDICTION OF THE STATES AND THE INDIAN TRIBES, AND PROVIDED MECHANISMS FOR THE TRANSFER OF CHILD WELFARE CASES FROM THE COURTS OF THE STATES TO THE COURTS OF THE TRIBES.

ALSO IN 1978, IN THE CASE OF U.S. v. WHEELER, THE SUPREME COURT AFFIRMED THE STANDING OF TRIBAL COURTS AS ARMS OF A SEPARATE SOVEREIGN WHEN IT RULED THAT PRINCIPLES OF DOUBLE JEOPARDY DO NOT APPLY TO PROSECUTIONS BEFORE A TRIBAL COURT AND A LATER PROSECUTION BEFORE A U. S. DISTRICT COURT.

IN TWO RECENT CASES, THE SUPREME COURT HAS ESTABLISHED THE PRINCIPAL THAT THE COURTS OF THE TRIBES HAVE THE INITIAL AND PRIMARY RESPONSIBILITY TO DETERMINE THE SCOPE OF TRIBAL JURISDICTION. THUS IN ITS 1986 DECISION IN NATIONAL FARMERS

UNION INSURANCE COMPANY v. CROW TRIBE, AND AGAIN IN 1987, IN IOWA MUTUAL INSURANCE CO. v. LAPLANTE, THE SUPREME COURT REMANDED CASES INVOLVING TRIBAL ASSERTIONS OF CIVIL JURISDICTION OVER NON-INDIAN LITIGANTS TO THE TRIBAL COURTS, FOR A DETERMINATION OF THE TRIBES' JURISDICTION, AND AFFIRMED THE PRINCIPLE THAT FEDERAL REVIEW WAS NOT PERMISSIBLE UNTIL THE REMEDIES AFFORDED UNDER TRIBAL LAW HAVE BEEN EXHAUSTED.

THE COURTS OF THE INDIAN TRIBES ARE CLEARLY AT THE FOREFRONT OF THE DEVELOPMENT OF MODERN TRIBAL GOVERNMENT. FROM THE STANDPOINT OF CIVIL JURISDICTION AND WITHIN THE LIMITS OUTLINED, THEY ARE COURTS OF GENERAL JURISDICTION WITHOUT LIMITATION ON THE DOLLAR SUMS OF CASES THEY MAY CONSIDER. FROM THE STANDPOINT OF CRIMINAL LAW, THEIR JURISDICTION OVER CRIMES BY INDIANS FOR OFFENSES NOT COVERED BY THE MAJOR CRIMES ACT IS WITHOUT DISPUTE, AND BY LAW, THEY MAY IMPOSE PUNISHMENTS OF UP TO ONE YEAR IMPRISONMENT AND A FINE OF $5,000, OR BOTH. IT IS THE RESPONSIBILITY OF THESE COURTS TO ENSURE THAT THE RIGHTS ESTABLISHED UNDER THE INDIAN CIVIL RIGHTS ACT ARE ADHERED TO.

DESPITE THESE RESPONSIBILITIES, TRIBAL COURTS GENERALLY ARE UNDERFUNDED AND UNDERSTAFFED, THEY EXPERIENCE A HIGH RATE OF JUDGE TURN-OVER, AND AS A GENERAL PROPOSITION, THERE IS NOT A STRONG APPELLATE SYSTEM TO ASSIST THE COURTS IN CARRYING OUT THEIR RESPONSIBILITIES.

THIS COMMITTEE IS STRONGLY COMMITTED TO THE SUPPORT OF TRIBAL JUDICIAL SYSTEMS, AND IT IS FOR THAT REASON THAT WE HAVE SET ASIDE THIS TIME TODAY TO EXAMINE WHAT MECHANISMS MAY BE PURSUED TO STRENGTHEN TRIBAL COURT SYSTEMS AND TO ASSURE THEIR FUTURE AS INTEGRAL BRANCHES OF MODERN TRIBAL GOVERNMENTS.

American Indians, Time, and the Law

Native Societies in a Modern Constitutional Democracy

CHARLES F. WILKINSON

Yale University Press
New Haven and London

tribes and some of which do not, that are embodied in the treaties and treaty substitutes and that can efficiently and fairly focus judicial analysis. The tribal interest approach is less cumbersome than the three-part balancing test—involving state, federal, and tribal concerns—employed in some cases.[122] In any event, the Court has in fact regularly spent the greater part of its analyses on tribal interests.[123] Focusing the analysis of tribal–state jurisdictional conflicts in Indian country on an assessment of tribal interests properly puts the emphasis on the transactions establishing Indian country, which remain the center point of federal Indian policy and law.

MAJORITY WITHIN A MINORITY: THE QUANDARY OF POLITICAL REPRESENTATION

Many of the most perplexing problems in Indian law involve the rights of non-Indians, especially residents, in Indian country. Tribes are moving ahead with newly adopted codes in sensitive areas such as land use, health, water, and environmental regulation. Increasingly, tribal governments are exercising their taxing authority. Tribal courts are handling larger caseloads, including litigation involving non-Indians. Yet claims against tribes are often barred, in both tribal or federal court, by tribal sovereign immunity.

Non-Indian residents raise a range of objections. Some complain, with considerable stridency, of racism, present or "potential," against them. When confronted with arguments of tribal reliance interests based on sovereign powers guaranteed by treaty, these non-Indians counter with a reliance interest of their own; as noted above, their predecessors were invited to the reservations by homestead or related policies, and there was seldom an indication that they would be governed by an Indian tribe. Most fundamentally, however, the non-Indians point to defects in the political process; because they cannot become tribal members, they lack the ability to vote in tribal elections, hold tribal office, or participate in decision making.[124]

When presented with these concerns about political representation, the Court has given them short shrift in the few direct discussions of the issue.[125] Yet, legalities aside, many fair-minded observers believe that the complaints of non-Indians raise legitimate policy questions. The lack of political representation plainly worries

lower court judges and some or all members of the Supreme Court.[126] The tribes as well suffer dangers by this perceived unfairness. If non-Indians have no recourse against tribal governments, then inevitably in close cases judges will be tempted simply to eliminate the potential unfairness to non-Indians by holding that tribal jurisdiction does not exist in the first place. This may have occurred already in a few difficult lower court cases.[127]

In one sense no explanation for tribal authority over resident non-Indians can be fully satisfactory. The quandary of political representation dramatizes the anomalous position Indian tribal governments hold in this country. One cannot completely reconcile classic political rights, as enjoyed by citizens in other political units in the United States, with the kind of rights that exist within Indian tribal governments for the fundamental reason that Indian tribal governments are literally foreign: they exist outside of the Constitution.[128]

This is not to say that we must proceed wholly without analogy. The concerns of reservation non-Indians can all be answered on a certain level. Racism is not present here—Indian tribes are political, not race-based, entities.[129] Homestead patents are just deeds that involved only title to real property and carried with them no express or implied warranties as to political control.[130] So, too, can the difficult political issues be explained, especially by drawing comparisons with international law.[131] People commonly are regulated and taxed in jurisdictions in which they have no political rights: when they travel to another state or foreign country; when they work in another city, state, or country; and when they own a second home in another state, county, or nation. Under this kind of analysis, even the most fundamental political right—that of citizens to vote in the jurisdiction of their residence—has not been denied to non-Indian residents in Indian country: they can vote in state, county, and city elections. In any event, their claim to participate in local tribal affairs is imperfect because they lack citizenship in the local government, the tribe.

Our jurisprudence, then, has recognized tribal authority as being both preconstitutional and extraconstitutional. These principles are premises for the conclusions that American Indian governments can be, for example, theocratic, hereditary, and race-based in citizenship. Powerful moral and historical considerations support this special tribal status. European nations recognized similar notions half a millennium ago, and in the United States all three federal branches have acknowledged the special attributes of Indian tribal sovereignty from the beginning.[132]

All of this is not likely, however, to remove the philosophical disquiet. The United States has gone to extraordinary lengths to provide a democratic form of governance and to guarantee protections against racial discrimination. Obviously, Indians have been denied access to the political process and have been subjected to racism aplenty, but the democratic process and all modern protections against discrimination are now fully available to them.[133] When Indian tribal governments act, however, some of the system's guards do not apply. How can we be sure that non-Indians within Indian territorial jurisdiction will be treated squarely? What is the proper rule of the judiciary?

My general formulation, which I will set out in more detail below, is that federal judicial review of tribal action is often appropriate and perhaps should be expanded. Procedure, however, should be sharply distinguished from substance. Courts should play a prudential role and recognize broad tribal authority over non-Indians as a necessary predicate for achieving the measured separatism promised in the treaties and treaty substitutes. Respecting substantive tribal authority over non-Indians while allowing limited federal review in individual cases of alleged injustices is the best method of substantially reconciling the legitimate interests of both tribes and non-Indians. Importantly, this prudential judicial role is appropriate because there are several other viable checks against arbitrary tribal action.

One area of exploration on procedural issues is the continuing viability of *Santa Clara Pueblo v. Martinez*.[134] *Santa Clara*, which held that a tribal member is barred by tribal sovereign immunity from obtaining federal judicial review of a tribal council decision concerning membership in the tribe, is in some respects one of the modern decisions most favorable to the tribes. It recognized the preconstitutional and extraconstitutional status of tribes, employed the canons of construction strictly in favor of tribal prerogatives, and gave an expansive reading to tribal sovereign immunity.[135]

The *Santa Clara* opinion, however, accomplishes little to provide a fair resolution of the legitimately troubling situation of reservation non-Indians. Title I of the Indian Civil Rights Act of 1968

(ICRA) imposes free exercise, due process, and equal protection constraints on tribes but *Santa Clara* refused to imply any federal remedies, finding that only tribal forums are available to enforce the ICRA. The one remedy expressly provided by the ICRA, the writ of habeas corpus to review tribal criminal prosecutions, is irrelevant for non-Indians, since tribes lack criminal jurisdiction over them.[136] Thus *Santa Clara* results in the anomaly of a federal civil rights act that provides only very limited federal remedies to enforce it.

Santa Clara does leave open federal judicial review in some circumstances outside of criminal cases. First, although the Court has foreclosed most suits against tribes and tribal officials, in some instances relief may be obtained against tribal officials acting outside the scope of their official duties.[137] Second, non-Indians can presumably raise offsetting claims, arising from the same transaction, when they are sued by tribes.[138] Third, a federal forum may be available against federal officials if they have reviewed the tribal action that is the basis of the grievance.[139]

There is another instance, of considerable importance to the rights of non-Indians in Indian country, in which *Santa Clara* does not block federal review. In 1985, the Court found in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*[140] that a party in a private civil tribal court action can, after fully exhausting tribal remedies, invoke federal-question jurisdiction and obtain a determination by a federal district court as to whether the tribe possesses jurisdiction. The case involved a non-Indian defendant in a personal injury case arguing that the tribal court lacked sufficient contacts under the "tribal interest" test.

The 1985 decisions demonstrate that non-Indians can obtain federal review of many major questions of tribal power. *National Farmers* allowed an insurance company to obtain a ruling on the jurisdiction of the tribal court. *Kerr-McGee Corp. v. Navajo Tribe*,[141] in which mineral companies were able to avoid tribal sovereign immunity by seeking a declaration as against tribal officials, permitted a test of tribal power to levy severance taxes. These kinds of questions involving the scope of tribal judicial and regulatory authority have been among the most pressing issues raised by non-Indians in Indian country; the existence of a federal remedy in this

context is a major step toward meeting the legitimate interests of non-Indians.

The rule in *Santa Clara*, however, still appears to prohibit federal courts from looking at alleged individual acts of discrimination by tribal officials. Take the examples of *National Farmers* and *Kerr-McGee*. Companies in those circumstances are allowed to test the scope of tribal jurisdiction, but if they lose on that question they appear to have no recourse if a tribal judge or jury openly and clearly favors the Indian party or if a tribal tax administrator enforces the tax code only against non-Indian companies. Since the equal protection and due process provisions of the Constitution do not apply to tribes, the only basis for a cause of action is the ICRA—and the Court in *Santa Clara* has announced that no federal cause of action, other than habeas corpus, lies to enforce the ICRA.

The matter cannot be finally resolved by stating that instances of arbitrary and discriminatory conduct by tribal officials may be rare. The overriding fact remains that *Santa Clara* is perceived as a fundamental barrier to a just legal process in Indian country by creating the specter of tribal powers that cannot be checked outside of the tribe. The legislative history of the ICRA gives substantial indications that Congress intended for federal courts to be available to enforce the rights enumerated in the ICRA.[142] At the same time, it bears repeating that there are powerful counterbalancing considerations—abridgments of tribal sovereignty should be construed strictly, as the thrust of the opinion in *Santa Clara* recognized.[143]

Perhaps a better approach, however, and one more consonant with Congress's will, is that federal courts should have jurisdiction to engage in limited judicial review when ICRA rights are allegedly abridged by tribal institutions. Reviewing courts would be required to respect tribal traditions and reservation conditions.[144] Tribal decisions could be overturned only upon a showing based on an elevated test, such as the arbitrary and capricious standard.[145] The requirement of exhaustion of tribal remedies should be rigorously observed.[146] Exhaustion means all recourse that a reasonable person familiar with the system would pursue.[147] In Indian tribes, for example, tribal councils, which are typically small, relatively informal units, often perform some of the functions of courts in the Anglo-American system. Thus exhaustion of remedies in the Indian con-

text, in order to be appropriately sensitive to the special qualities of tribal legal institutions, will often entail a serious attempt to enlist the aid of the tribal council.

Ultimately, limited federal review as proposed here accords tribal governments much the same kind of deference, premised on a presumption of regularity, that federal courts accord state institutions. Such an approach is appropriate because tribes are exercising local sovereignty in much the same way that states do outside of Indian country. This is the real message of the 1985 decision in *National Farmers*, where the Court, citing authority involving state courts and plainly conceptualizing tribes as direct analogues to states, made these concluding comments in requiring that the tribal court should first decide the question of tribal jurisdiction before any review by the federal court:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[148]

Federal review of this kind would be a minor incursion on tribal sovereignty and would meet legitimate concerns about unfair treatment by tribes of both Indians and non-Indians. It would amount to a safety valve allowing serious injustices, real and perceived, to be heard. The admitted intrusion on tribal sovereignty would be outweighed by the benefits from the defusing.

So let us suppose that it is good policy and law to allow limited federal judicial review of alleged arbitrary, and possibly racist, conduct by tribal institutions. The question remains how courts should approach the task of defining substantive powers of Indian tribes over non-Indians.

The settled principles of preconstitutional and extraconstitutional tribal status, coupled with the promise of a viable, evolving separatism in the treaties and treaty substitutes, justify race-based tribal governments without political representation by nonmembers. The courts should respect these precepts and provide latitude to tribes by generously construing tribal powers over nonmembers. Congress, not the courts, should make alterations based on expediency.[149]

The Court has recognized its special institutional obligation to protect minority rights. This duty is evidenced by the *Carolene Products* footnote, by the desegregation decisions, and by other decisions protective of racial minorities, and has recently been expanded upon in John Hart Ely's *Democracy and Distrust*.[150] Beginning with the Marshall Trilogy the tradition has been especially rich in Indian law.[151] The Court has forthrightly acknowledged the need for protecting Indians from the states: "Because of the local ill feeling, the people of the States where they [Indians] are found are often their deadliest enemies."[152] In *Williams v. Lee*,[153] the first case of the modern era, the Court flatly stated: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." In 1984 the Court reaffirmed its "traditional solicitude for the Indian tribes."[154] A continuing theme of the modern opinions is for the Court to affirm the existence of Indian rights, with the caveat that Congress can make adjustments pursuant to its power over Indian affairs.[155]

I well appreciate the apparent irony of citing *Carolene Products* and Dean Ely in support of the proposition that courts should broadly construe the powers of tribes over nonmembers: Ely and other process theorists hold that the essential function of the Constitution is to insure access to all aspects of the political process. Superficially, a process-based analysis seems to call for granting non-Indians rights within tribal governments or, at the least, strictly construing tribal powers over non-Indians. Process theory, however, seems to me not to support the rights of the non-Indian minority in Indian country. First, process theory is constitutional theory, and the Constitution does not limit Indian tribes on the questions at issue here. Thus the policies so firmly embedded in the Constitution

are simply inapplicable. Second, to the extent that participational rights have a value independent of the Constitution (and they do) or to the extent that they have been applied to the tribes by statute, this is a situation in which the "minority" of non-Indians is in fact a majority. Process theory is nothing if not an attempt to analyze constitutional law systemically. The non-Indian minority in Indian country may not have direct participational rights in tribal government, but non-Indians have political clout in the Department of Interior, Congress, and state governments due to their superior numbers and economic position. Non-Indians in Indian country, then, should be treated as a majority for the purpose of process-based analysis: the courts should fulfill their traditional obligation of protecting minority rights, in this case Indian tribal rights.

There are other institutional reasons why the Court should play a prudential role by broadly construing tribal powers, even when non-Indians are involved, and leaving Congress to make corrections if necessary. Most fundamentally, no one now knows whether alleged abuses against non-Indians are either serious or widespread. As I discussed earlier, judicial opinions in Indian law usually involve just one tribe but apply generically to all tribes. Thus if a court is influenced by an individual flagrant abuse and departs from principle to deny tribal powers, the rights of all tribes are implicated. The same is true of presumed but unproven abuses that a judge may unconsciously employ as a backdrop in a particular case. Whether abuses exist and, if they do, whether they are sufficiently serious to warrant curtailing tribal powers are matters that Congress is best equipped to resolve. A legislature is not bound by the facts of just one case. Congress has investigative and oversight powers designed to produce a comprehensive record. Institutionally, the courts are best suited to the judiciary's traditional role of holding firmly to historic principles that are protective of tribal prerogatives.

Further, events are rapidly occurring in the field that justify a judicial stance protective of broad substantive tribal authority over non-Indians. The possibility of abuses by tribes against non-Indians is lessened by several developments. As I discussed earlier in this chapter, federal judicial review is left open to curtail many abuses of tribal power without denying the existence of tribal power. The Department of the Interior has asserted its power to oversee tribal codes that would regulate or tax non-Indians. Some tribes have set

up advisory boards that allow nonvoting reservation residents to influence policy on matters affecting them. Others have established special assessment districts that extend the vote to all persons within the districts. Regional courts of appeals have been established in the Pacific Northwest and in Oklahoma so that an intertribal appellate court can hear appeals, removed from the pressures of the reservation where the case arises. A movement of sweeping importance is the boom in intergovernmental agreements, in which states or local governments have settled jurisdictional arrangements with tribes by negotiation. In several recent instances, state legislatures have enacted laws at the joint request of tribes and states to settle differences.[156]

These are all enormously healthy developments because they allow for pragmatic, on-the-ground dispute resolution by the parties actually involved. The courts should allow this process to continue, confident that the judiciary's historic prudential role of protecting rights of American Indians will be crafted into specific shapes by legislation, administrative action, and, most important, negotiation. Ultimately, if the process does continue, then tribal governments will at long last be given the chance to conquer the effects of time that have stilled tribal activity for so long.

Notices

Federal Register
Vol. 52, No. 248
Monday, December 28, 1987

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ACTION

Office of the Director

National Volunteer Advisory Council; Committee Renewal

In accordance with provisions of the Federal Advisory Committee Act, and after consultation with the General Services Administration (GSA), I have determined that renewal of the National Volunteer Advisory Council is in the public interest in connection with the performance of the duties and mission of the ACTION Agency.

The Council will advise and make recommendations to the Director of ACTION with respect to policy matters arising in the administration of the Domestic Volunteer Service Act of 1973, as amended (Pub. L. 93–113), and as to the effectiveness of ACTION programs. The Council will also make final recommendations for the President's Volunteer ACTION Awards.

Advisory Council membership is chosen from all areas of the country and from a broad cross section of industry, labor, local, state and Federal government and non-profit organizations. The Council will consist of 25 members, including the Chairperson. The members are selected for their expertise and serve in their individual capacities, not as representatives of their organizations. The Council will function solely as an advisory body and in compliance with the provisions of the Federal Advisory Committee Act. The Charter will be filed with GSA and the appropriate Congressional Committees.

Further information may be obtained from: Loni Hagerup, Special Assistant to the Director, 806 Connecticut Avenue NW., Suite 500, Washington, DC 20525, (202) 634–9380.

Signed at Washington, DC this 18th day of December, 1987.

Donna M. Alvarado,
Director, ACTION.

[FR Doc. 87–29560 Filed 12–24–87; 8:45 am]
BILLING CODE 6050–28–M

COMMISSION ON CIVIL RIGHTS

Indian Civil Rights Issues; Hearing

Notice is hereby given pursuant to the provisions of the United States Commission on Civil Rights Act of 1983, Pub. L. 98–183, 97 Stat. 1304, that a public hearing before a Subcommittee of the U.S. Commission on Civil Rights will be held on January 28, 1988, beginning at 10:00 a.m. and continuing on such succeeding days as may be deemed appropriate at the discretion of the Chairman, at the U.S. Commission on Civil Rights, Room 512, 1121 Vermont Avenue NW., Washington, DC.

The purpose of the hearing is to receive evidence about enforcement of the Indian Civil Rights Act and about the Department of the Interior's responsibilities concerning enforcement of the Indian Civil Rights Act.

The Commission is an independent, bipartisan factfinding agency authorized to study, collect, and disseminate information and to appraise the laws and policies of the Federal Government, and to study and collect information concerning legal developments, with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, handicap, or national origin, or in the administration of justice.

Dated at Washington, DC, December 22, 1987.

Clarence M. Pendleton, Jr.,
Chairman.

[FR Doc. 87–29581 Filed 12–24–87; 8:45 am]
BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Agency Information Collection Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Export Administration.

Title: Distribution License Procedure.

Form Number: Agency—EAR 373.3; OMB—0625–0052.

Type of Request: Extension of the expiration date of a currently approved collection.

Burden: 550 respondents; 23,154 reporting/recordkeeping hours.

Needs and Uses: A Distribution License is a bulk license authorizing the holder to make multiple exports of authorized commodities to foreign consignees approved in advance by Export Administration. The information gathered is used by Export Administration to evaluate whether or not the applicant is eligible for this special license.

Affected Public: Businesses or other for-profit institutions; small businesses or organizations.

Frequency: On occasion/ recordkeeping.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: John Griffen 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michels, (202) 377–3271, Department of Commerce, Room 6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to John Griffen, OMB Desk Officer, Room 3228, New Executive Office Building, Washington, DC 20503.

Dated: December 21, 1987.

J. Randall Blumenschein,
Chief, Management Support Division, Office of Management and Organization.

[FR Doc. 87–29659 Filed 12–24–87; 8:45 am]
BILLING CODE 3510–CW–M

International Trade Administration

[C–301–003]

Roses and Other Cut Flowers From Colombia; Final Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Commerce.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

December 9, 1987 HAND-DELIVERED

Honorable Donald P. Hodel
Secretary of the Interior
United States Department of the Interior
18th & C Street, N.W., Room 6117
Washington, D.C. 20240

Dear Secretary ~~Hodel~~ Dan:

The U.S. Commission on Civil Rights, pursuant to its responsibility to monitor enforcement of Federal civil rights laws, is examining enforcement of the Indian Civil Rights Act of 1968 (ICRA). As part of this evaluation, a Commission Subcommittee has held hearings in South Dakota and Arizona on ICRA enforcement by several tribes, focusing primarily on the Navajo Tribe, the Zuni Pueblo Tribe, and the Cheyenne River, Rosebud, and Pine Ridge Sioux Tribes. When its examination is complete, the Commission will report its findings and make recommendations to the President and the Congress.

The Subcommittee's monitoring of ICRA enforcement would be incomplete were it not to include consideration of the role of the Bureau of Indian Affairs. While this matter received attention at the Subcommittee's field hearings, that attention was necessarily incomplete. For this reason, the Subcommittee will convene a hearing here in Washington to give thorough consideration to the Department's ICRA policy. We invite your Department to testify at the hearing, which will take place at the Commission's offices on January 28, 1988, at 10:00 a.m.

We have enclosed a list of questions which we would like answered by your Department. Certain of the questions pertain to your policy with regard to ICRA enforcement. Others ask for data on ICRA enforcement, 638 contracts with tribes, tribal constitutions, and training provided for tribal judges and personnel. We would be grateful if you would forward these questions to the appropriate offices for response and, in addition, if you would designate officials to represent the Department of Interior at the Commission's hearing.
In order to expedite the collection of the information we are requesting as well as other information Commission staff may want to obtain prior to the hearing, I have asked that Commission staff visit your Department on or before December 18 and speak with persons who are familiar with the availability of the data we have requested. Commission staff will therefore contact your office later this week to identify with whom they should meet.

Sincerely,

CLARENCE M. PENDLETON, JR.
Chairman

Enclosure

QUESTIONS

PART I: GENERAL OVERSIGHT

In April 1986, Associate Solicitor for Indian Affairs Tim Vollmann described the role of the Department with respect to the ICRA in an outline prepared and distributed to a meeting of the Indian Law Section of the Federal Bar Association. The outline points out that in Martinez the Supreme Court rejected the idea that the Secretary of Interior had enforcement or review authority over tribal actions, except when a tribal constitution or Federal statute requires Secretarial approval of tribal ordinances. When that exception applies, the outlines further states, the Department must "be cognizant of a tribe's compliance with the Indian Civil Rights Act and other federal laws before it acts to recognize certain governmental actions."

His outline also states:

> A. The policy of tribal self-determination and practical considerations create an institutional reluctance to become routinely involved in allegations of ICRA violations.
>
> 1. BIA has programs to enhance tribal institutions and encourage ICRA compliance.
> 2. Even the most peripheral involvement in tribal processes makes the Department a target of lawsuits by dissident challengers of tribal action.
>
> B. Violations of ICRA may be a basis for BIA declination to contract programs with a tribe under P.L. 93-638.
>
> C. Violations of ICRA may affect how the Secretary exercises his trust responsibility with regard to tribal trust assets, both funds and natural resources.
>
> D. A gross violation of the ICRA (e.g., violation of due process through disregard of the tribal constitution or laws governing tribal elections) may affect the federal government's recognition of tribal representatives.

1. Do the statements cited above represent the current policy of the Department of Interior with respect to ICRA enforcement? If not, what is the current policy? Is issuance of a new policy under consideration? If so, in what office? When will it be issued?

2. What are the "practical considerations" cited in Mr. Vollmann's outline that contribute to "an institutional reluctance to become routinely involved in allegations of ICRA violations?" Please give examples.

3. Quoting from the Vollmann outline, what programs does BIA have in place "to enhance tribal institutions and encourage ICRA compliance?"

4. Does BIA monitor ICRA violations? If so, please describe how and provide the Commission with information on the ICRA violations that have taken place since 1978.

5. Vollmann's outline asserts that ICRA violations may be a basis for BIA declination to contract programs with a tribe under P.L. 93-638. Is this current policy? Since Martinez, has BIA ever declined to contract such programs because of ICRA violations? If so, when and on what basis?

6. Since Martinez, again citing the outline, how often has the Department's exercise of its trust reponsibility been affected by ICRA violations? In how many cases was ICRA noncompliance the stated reason for agency action or inaction?

7. Since Martinez, again citing the outline, how often has the Department refused recognition of tribal representatives because of "gross ICRA violations?" What is a gross ICRA violation and where is it defined? How many gross ICRA violations have taken place since 1978? Does the Department have information in its files on these violations?

8. What offices of the Department of the Interior have responsibilities or collect data in relation to the Indian Civil Rights Act?

9. A letter of August 3, 1987, from the Judicial Services Branch to the Commission states that "The mission of the Branch of Judicial Services within the Bureau of Indian Affairs is to help tribal governments establish and maintain a strong and viable Indian Judicial System capable of dispensing equal justice." What are the stated criteria of the Judicial Services Branch for determining whether

tribal governments have "strong and viable Indian Judicial System[s] capable of dispensing equal justice?" Are the criteria published? If the Judicial Services Branch does not have stated criteria, how does the BIA measure the progress of tribal judicial systems? Is ICRA enforcement one of the measurements used? What other factors are relevant? Please provide the Commission with a directory of the Judicial Services Branch.

10. What are some of the recent accomplishments of the BIA in assisting tribal judicial systems?

11. What are weaknesses of the BIA in administering tribal judicial systems under 638 contracts?

12. What duties or responsibilities does the Bureau have with respect to violations of a tribal code or constitution? In carrying out these responsibilities, what procedure is followed and what offices carry out the responsibilities?

12. 25 C.F.R. Section 81.5(a) authorizes a Secretarial election only "upon a request from the tribal government." In light of the Zuni Pueblo succession election dispute about which the recently Commission received testimony, will the regulations be changed to allow direct petitions to the Secretary from a substantial percentage of enrolled eligible voters? Are any other regulatory changes contemplated as a result of the Zuni experience? How many other such instances have there been since 1978?

13. Please list the types of contracts between the BIA and a tribal government under P.L. 93-638 and provide a printout of all 638 contracts currently in force. How many are for tribal courts? Tribal police? Appeals courts? Tribal councils? Public Defender services? Judicial training?

14. Under 25 U.S.C. §450f(c), which, if any, of the Pub. L. No. 93-638 contract categories are routinely required to contain insurance clauses requiring liability insurance coverage and waiver of sovereign immunity by tribal governments?

15. Please state the reason why some of the Pub. L. No. 93-638 contract categories are not routinely required to contain liability insurance coverage clauses.

16. Please state what BIA personnel, by job classification, are responsible for negotiating, reviewing, approving, and signing the Pub. L. No. 93-638 contracts in each category.

17. In 1973, the BIA proposed a task force to study enforcement of the ICRA and to prepare interpretative guidelines and a model code of criminal procedure. Was this in response to section 301 of Title III of the Civil Rights Act of 1968? Was the proposal adopted and the task force assembled? Were the guidelines prepared? If so, please provide the Commission with a copy. Was the model code drafted? If so, please provide the Commission with a copy. If neither was prepared, please explain why not.

18. In an October 27, 1987, statement to the Subcommittee on Interior and Related Agencies of the Committee on Appropriations for the House of Representatives, the Assistant Secretary for Indian Affairs proposed to give tribes greater control over self-determination funds. He stated that among other things, "this would be necessary to establish . . . certain minimum standards with respect to protection of individual rights and public safety."

    (a) Please describe what the "minimum standards" would be. Would these standards be compliance with the ICRA and/or other rules or regulations? Which ones?

    (b) Would tribes have to demonstrate compliance with minimum standards before being eligible to exercise greater control over Federal funds? What would constitute satisfactory evidence of compliance?

    (c) Would there be a procedure for terminating funds if it were determined that a tribe did not meet these standards? Please describe what process. Would a tribe not in compliance be allowed to receive funds under a contract?

    (d) Who would make the determinations of compliance, an administrative law judge? A Federal judge? A contract compliance officer?

    (e) Does the BIA currently have the capability to enforce minimum standards for the protection of individual rights? If it does not, what additional resources would be required?

PART TWO: DATA ON TRIBAL COURTS AND ICRA CASES

The following questions ask for data to be broken down by tribe and area office, and are accordingly phrased as if directed to each BIA area office. Please provide as much information as is currently available in Washington, D.C., and ask area directors to respond to those questions which cannot be answered by Washington personnel.

Training

1. Please indicate what training is provided to judges and court personnel for the tribes in your area. What specific training is given with respect to implementation of the safeguards contained in the ICRA?

2. What is the total number of tribal judges in your area? Of this total, how many have law degrees? How many have received special training on the ICRA?

3. Do you believe those subject to tribal law need to be better informed of their rights under the ICRA? What steps has your office taken to inform those subject to tribal law in your area of their rights under the ICRA?

4. What is the total number of tribes in your area? Of this total, how many have written constitutions? Please provide the Commission with copies of these constitutions.

5. Please indicate which of the tribes in your area have, and do not have, each of the following ICRA rights included in their constitutions or laws:

CIVIL

a. Freedom to practice religion
b. Freedom of speech
c. Freedom of the press
d. Freedom of assembly and/or redress of grievances
e. Eminent domain (taking of land for public purpose with just compensation)
f. Freedom from bills of attainder and/or ex post facto laws
g. Equal protection of the laws
h. Due process

CRIMINAL

a. Unreasonable searches and seizures
b. Double jeopardy
c. Self-incrimination
d. Right to speedy trial
e. Right to public trial
f. Right to be informed of nature and cause of accusation
g. Right to confront and compel witnesses
h. Right to counsel
i. Limit on excessive bail
j. Prohibition of cruel and unusual punishment
k. Sentencing limitation
l. Equal protection of the laws
m. Due process
n. Bills of attainder and/or ex post facto laws
o. Trial by jury

6. Please describe the method by which judges for the tribal courts in your area are selected.

7. Do all the tribal courts in your area have law clerks? File clerks? If not, how many do and how many do not?

8. Please list each tribe in your area and state whether it has a prosecutor or public defender system or both or neither.

9. Are attorneys permitted to appear before the tribal courts in your area? If not, please identify which tribal courts do not permit them to appear. If so,

   a. are they permitted in civil cases?

   b. are they permitted in criminal cases?

   c. please indicate the criteria for permitting their appearance.

   d. If tribal court bar admission is required, please indicate the criteria for admission.

10. Which tribes in your area have courts of record, i.e., in which the proceedings are transcribed or taped? Please list each tribe indicating whether they have courts of record and how the record is kept for each court. Of those tribes with courts of record,

    a. are court reporters used in proceedings in the tribal courts in your area? If not, please identify which courts do not use court reporters.

    b. are tape recordings made and kept but not transcribed? Please indicate what the practice is in each of the tribal courts in your area.

    c. are tribal court opinions published and how may they be obtained?

    d. are tribal ordinances published and how may they be obtained?

11. To whom may an appeal from the tribal courts in your area be taken, i.e., whether to appellate courts, Tribal councils, or no appellate mechanism. If the system differs among the tribes in your area, please identify the differences, by tribe.

12. Please list the tribes in your area that have judicial appellate tribunals. In your list, please state:

    a. how many judges sit on each

    b. the exact name of the judicial appellate tribunal.

    c. the standard for appellate review: de novo or on the record.

13. How many judges who sit on the tribal courts in your area also hear appellate cases? Please list the judges by tribe.

14. Since Martinez, have the tribal appellate courts in your area ever formally invoked the ICRA in reviewing cases from the lower courts? Please identify which appellate courts in responding to this question.

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15. Do you keep records of the number of cases in the tribal courts in your area in which the pleadings allege a

violation of the ICRA? If not, please identify who does. If so, please state by year the number of cases tried in the tribal courts in your area, post-Martinez, in which the pleadings allege a violation of the guarantees of the ICRA.

_____ 1978 _____ 1979 _____ 1980

_____ 1981 _____ 1982 _____ 1983

_____ 1984 _____ 1985 _____ 1986

16. In the cases identified in the preceding question, please state the number of cases in which nontribal members have invoked the ICRA.

17. Please state by year the number of cases for the period 1978-1986 in which the ICRA or a similar tribal ordinance or constitution was formally found to have been violated.

_____ 1978 _____ 1979 _____ 1980

_____ 1981 _____ 1982 _____ 1983

_____ 1984 _____ 1985 _____ 1986

18. Please briefly describe the types of problems affecting ICRA enforcement in the tribal courts in your area. In your view, are any of these problems serious? How should they be addressed?

19. In your opinion, does Congress need to amend the ICRA? If so, please briefly outline what changes you think are needed in the ICRA. If not, why not?

20. In your opinion, how much do tribal politics affect the independence of the tribal courts in your area?

21. In your opinion, should there be any kind of limited Federal judicial review of tribal court ICRA decisions, other than in habeas corpus cases? Please explain the reasons for your answer.

22. Have the tribal councils ever overruled tribal courts in your area since 1978? Please list by tribe the instances of such overruling, identifying the case name and year. Also, please state whether the pleadings in any of these cases alleged a violation of any the guarentees protected by the ICRA, or a similar tribal ordinance or constitutional provision.

23. In how many ICRA cases has sovereign immunity been raised as a defense since 1978? In how many of these cases has the defense been successful?

PREPARED

STATEMENT OF PROFESSOR DAVID H. GETCHES

TO

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

HEARINGS ON TRIBAL COURT SYSTEMS

JANUARY 22, 1988

WASHINGTON, D.C.

Chairman Inouye, members of the Committee, I am David H. Getches, professor of law at the University of Colorado Law School. I appreciate your invitation to address this Committee. I appear today as one who has studied and written and litigated and taught federal Indian law for many years. I was the founding director of the Native American Rights Fund, coordinator for the National American Indian Court Judges Association Long-Range Planning Project, and have published books and articles in the area. My work has brought me into contact with tribes and tribal governments throughout the country.

1988 - A Time for Reflection on the Progress of Indian Courts

This year is the one hundredth anniversary of the first congressional appropriation of funds for Indian judges. In 1888, $5000 was appropriated by the U.S. Congress for Indian judges. That is the same year that one federal court described the role of Indian courts as being "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes . . ." U.S. v. Clapox, 35 F. 575, 577 (D. Or. 1888). At that point courts were actually tools to purge Indian culture from Indian country.

This year is also the twentieth anniversary of the report of the Indian Civil Rights Act. 25 U.S.C. §§ 1301-1341. That statute ostensibly had two purposes: to protect individual rights and to strengthen tribal courts and tribal government. But the recitation of the second motive is eclipsed by the extensive prohibitory language of Title I of the Act that begins: "No tribe in exercising powers of self-government shall . . ." and then lists several prohibitions on the conduct of tribal government.

This is the tenth anniversary of the report of the National American Indian Court Judges Association Long-Range Planning Project that studied twenty-three Indian courts, assessed strengths and weaknesses of Indian courts, and made recommendations for court improvement. The report offered model standards for Indian courts and recommended a plan for the future that included items for action by the Bureau of Indian Affairs and items for action by tribes. That report recognized that tribal courts must "develop as strong elements of Indian government in order to protect the residual sovereignty of tribes against incursions by state and local governments, and to fulfill Congress's own requirements under the Indian Civil Rights Act." National American Indian Court Judges Association, Indian Courts and the Future 13 (D. Getches, ed. 1978).

The recommendations in the 1978 report have been partially implemented. The last ten years has been a period of quiet, determined improvement and impressive gains by tribal courts. It has also been the period of the greatest expansion in the

recognition of tribal sovereignty in the history of Indian affairs. There are new and heavier pressures on tribal governments. Federal laws and court decisions of the decade since 1978 have freighted new responsibilities on Indian courts.

In 1978, the Supreme Court decided Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), limiting federal court enforcement of the Indian Civil Rights Act and leaving the burden, appropriately, with tribal courts. The United States Supreme Court and lower federal courts have bolstered tribal authority to tax multi-million dollar non-Indian enterprises (e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)); to regulate Indian and non-Indian fishing and hunting on reservations (e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)); and to control land use and zoning and building codes (e.g., Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982)). Courts have also limited the Supreme Court's questionable decision in the Oliphant case (Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)) by firmly grounding the exercise of primary jurisdiction of Indian courts over reservation civil disputes between Indians and non-Indians (e.g., National Farmers Union Insurance Co. v. Crow Tribe of Indians, 105 S. Ct. 2447 (1985)).

During the same period Congress passed landmark legislation enabling wider exercises of inherent tribal sovereignty. The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, is perhaps the most powerful Indian jurisdictional law, giving tribes immense powers over Indian child placements and adoptions.

It supplants the role of state courts in these matters, with major impacts within and outside reservations, causing deep emotional reactions and heavy public attention on Indian courts and Indian tribes. Congress recently has enhanced tribal authority over the environment on Indian reservations. Major amendments to the Clean Water Act, 33 U.S.C.A. § 1377(e), Safe Drinking Water Act, 42 U.S.C.A. § 300j-11, Superfund, 42 U.S.C.A. §§ 9604(d), 9626(c), and other federal environmental laws (e.g., Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. §136u; Resources Conservation and Recovery Act, 42 U.S.C.A. § 6948(a)) offer responsibilities to tribes comparable to state responsibilities in managing and enforcing highly complex and detailed federal programs.

Tribes have begun to rise to these challenges. They are enacting codes to exact taxes, regulate reservation resources -- land, wildlife and water -- and people within Indian country. And they are enforcing their laws. Exertions of tribal power demand judicial forums. Enforcement of laws results in court action. Review of administrative and political decisions necessitates judicial oversight and interpretation. And, of course, resolving conflicts between parties in all these contexts invokes judges and the courts.

The Supreme Court has laid the groundwork for non-Indian challenges to Indian court decisions in federal court. E.g., National Farmers Union Insurance Co. v. Crow Tribe of Indians, supra; Iowa Mutual Insurance Co. v. La Plante, 107 S. Ct. 971 (1987). Indian courts can define their jurisdiction in the first

instance, but, the federal courts can oversee the jurisdictional decisions of Indian courts to make sure that they are correct and fair.

Recommendations

The developments of the past ten years add up to an immense challenge to Indian courts. Congress should consider several recommendations to help answer this challenge. The recommendations in the report of the National American Indian Court Judges Association remain apt and viable. I append a copy of the report to this testimony. In addition, I would like to offer four specific recommendations for congressional attention.

1. National Tribal Judicial Institute

A national tribal judicial institute should be established to provide resources and support services for Indian courts throughout the country.

The institute should exist outside the U.S. government, but with the United States giving financial support and taking policy guidance from the center. The most important needs of Indian courts are independence and professionalism. Independence requires a degree of freedom from the political and economic vagaries of both the federal and the tribal governments. Professionalism requires that courts must be effective in what they do: they must operate wisely. Wisdom starts with a sense of fairness, but today wisdom includes an understanding of legal doctrine and procedure, and even of technical issues. Judges today need to understand about water and fish and pollution and blood alcohol tests. This requires qualified personnel and

training. To secure independence and professionalism Indian courts need a dependable, adequate base of funding. They should not be required to compete in the rough and tumble of budget setting priorities for federal and tribal funds. The institute can address both these needs -- independence and professionalism.

The first major function of the institute should be providing judicial support services that are needed by all courts. All courts need technical assistance and training, in a wide range of subject matter. For instance, they need to know how to handle and comprehend complex bases involving scientific and technical issues. At another level they could benefit from training on how to incorporate their own traditional law into their jurisprudence. Traditional law and traditional dispute resolution techniques are likely to be the most successful in bringing justice to Indian Country. There are a variety of other, more familiar, subjects between these examples that should be treated in Indian judicial training.

Activities for the institute could also include furnishing independent legal advice to courts; setting standards for the qualifications of court personnel; setting standards for the operation, management and administration of Indian courts; recommending model bar admission requirements; designing record keeping procedures; drafting a judicial ethics code; exchanging information among tribal courts through a regular publications program; data collection and analysis; and providing an entity to interact with state and federal court counterparts.

Some of the functions I recommend for an institute are being performed superbly by the National Indian Justice Center which was formed in 1983. The Center conducts excellent training programs, furnishes planning and evaluation assistance, code drafting, research and court personnel evaluation. In addition, the American Indian Lawyer Training Program publishes decisions of Indian courts, assisting in building a tribal common law. These are fine beginnings and they demonstrate the efficacy of using non-profit organizations instead of a government agency. But resources allocated to the Center and to AILTP are inadequate They pale in comparison to the resources that are needed. The institute that I recommend should enhance the present services that are available outside the framework of the Bureau of Indian Affairs, perhaps by expanding the mission and funding of the National Indian Justice Center.

A second, perhaps unprecedented, kind of function of the institute would be to set national standards for the funding of individual tribal courts. It is always sensitive for a national entity to deal with the affairs of an individual tribe, but a better funding mechanism is needed for Indian courts. It is unacceptable to put Indian courts through the same annual priority setting process that other tribal programs are put through. Courts are not "programs." They are the engines of Indian self-government. Programs include important functions like day care, burial benefits, oil and gas leasing, education, and alcohol counseling. The tribal political process now ranks the budgetary needs for these programs in the same list as Indian

judicial systems. Judges vying for funds become politicians. Justice is not a program and judges should not be politicians. Instead, the institute that I have suggested could develop a funding formula to provide a baseline of support for all Indian courts. The tribal court still would approach the tribal council to seek budgets for enhancement items through the band analysis process, but basic needs would be secure.

2. Remove limits on tribal criminal jurisdiction

My second recommendation is that the criminal jurisdiction of Indian tribes be increased. The Indian Civil Rights Act, 25 U.S.C. 1302(7), places a limitation of $5,000 and one year in jail on penalties imposed by tribal courts for criminal offenses. These limits were much lower prior to a 1986 amendment. Congress wisely raised the limits, but the reason given in the legislative history is curious: to enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics in Indian reservations. There are greater reasons for expanding Indian courts' authority to impose penalties.

At this point, serious crimes in Indian country go unpunished and the safety of people on reservations is jeopardized. United States Attorneys refuse to prosecute many Indian country crimes because of the cost and difficulty of investigating and handling cases from distant and strange reservations. The high declination rate of federal prosecutors is exacerbated by limits on tribal prosecutions. Low tribal penalties essentially divest Indian tribes of the jurisdiction they need to deal with serious crimes. The United States Supreme

Court observed in 1978 that "[t]he issue of [whether tribes share jurisdiction with the federal government] over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment which can be imposed by Indian tribal courts . . ." Oliphant v. Suquamish Indian Tribe, supra 453 U.S. at 204 n.14. The recent increase in penalties, though salutary, does not clearly reverse the Court's reasoning.

Repealing the limitation on Indian court criminal penalties would be to restore the status quo as it existed before the Indian Civil Rights Act. The provision was not imposed because of a record of abuses of tribal criminal jurisdiction. And Indian courts have dramatically improved since then.

3. Tribal-State Cooperative Jurisdiction Act

Third, I recommend enactment of enabling legislation for agreements between tribes and their neighboring state and local governments -- a tribal-state cooperative jurisdiction act. It is not now legally possible for a county and a tribe or a state and a tribe to agree, for instance, for the tribe to take over misdemeanor criminal jurisdiction over non-Indians. Such agreements would very likely be concluded between many tribes and neighboring local or state governments, such as the Salt River Tribe and the State of Arizona. But without congressional consent, a criminal defendant can challenge such a consensual allocation of jurisdiction among governments. The U.S. Supreme Court has held that, because of Public Law 280, tribes and states cannot enter into agreements voluntarily parceling out

jurisdiction. Kennerly v. District Court, 400 U.S. 423 (1971). The legislation, then, would allow negotiated jurisdictional arrangements that make sense to the governments of a particular area. Furthermore, it would allow the parties to avoid the wrongheaded decision in the Oliphant case -- a case where the Suquamish Tribe was trying responsibly to deal with a breach of peace, damage to its property and assault on its officers by a non-Indian after requests for assistance in patrolling a tribal celebration had been refused by the county and the BIA. Though the decision was based on an erroneously fabricated history, it stands as a barrier to any tribal assertions of criminal jurisdiction over non-Indians. Other problems -- including allocation of jurisdiction to and from tribes to deal with a variety of criminal and civil subject matter -- could be solved amicably by those closest to them if the proposed act were passed. Furthermore, it could encourage tribes and state and local governments to pursue the kinds of cooperation and comity (cross-deputization, reciprocal enforcement, etc.) that is possible but rarely pursued now.

4. Replace CFR Courts with Tribal Courts

My fourth recommendation is that "CFR courts" -- the remaining courts operated on reservations under the auspices of the Department of the Interior under "laws" and procedures in the Code of Federal Regulations -- be eliminated. They are vestiges of the paternalism and assimilationist policies of the 19th century. Their origin is in liquor suppression and attempts to homogenize tribes with the dominant society by imposing "law and

order" regulations. There is no statutory authority for CFR courts; no legislation is necessary to eliminate them. A nudge from the Congress, however, in appropriation legislation, a rider on another Indian justice bill, or even in directive language in a report, would encourage the Bureau of Indian Affairs to eliminate the CFR courts that remain. This would be an important symbolic and substantive gesture and would lay to rest an anachronism. This is important for the tribes that still have CFR courts in the revitalization of their self-government, and it is important to all tribes to see the day of paternalistic control of Indian life and values through federal administrative "courts" ended.

Conclusion

Indian courts are under a microscope today. They are under the watchful eyes not only of tribal members who are subject to their jurisdiction, but of non-Indians, Congress and federal courts. There is even a federal agency charged with protecting minority interests, that has decided to investigate tribal courts. The quality of tribal court performance in the next few years consequently may be the single greatest factor in whether Congress and the Supreme Court expand or contract tribal powers.

Congress should avoid hasty, inappropriate overreactions to allegations that problems exist in Indian courts. The limits on Congress's powers in Indian affairs are virtually nonexistent. The Supreme Court has recognized a doctrine of plenary power that allows Indian treaties to be abrogated and tribal governing powers to be divested. The question is not one of power but of

finding the most appropriate solutions if problems in Indian justice should arise. Is the solution to curb the powers of courts -- to eliminate functions and supervise court systems? That is not the solution offered when there is anecdotal evidence of a non-Indian, county court abusing individual Indians' civil rights. No one seriously recommends divesting Texas courts of powers because their decisions have been influenced by campaign contributions to judges from parties to the cases. The response to abuses of court systems is to work within the individual court systems to improve them. That is precisely the kind of solution that should be pursued as problems are found in Indian courts. The problems of Indian courts are solvable. They are problems caused by limits -- limits of jurisdiction, limits of resources and limits of experience. They are more apparent in an era of vastly expanded responsibilities, expectations and scrutiny. Before assuming that Congress should cut the deep historical roots of Indian sovereignty, Congress would be well advised to find ways to strengthen those roots.

Congress has an opportunity and an obligation to assure tribes the ability to respond to these challenges. This obligation comes from the federal-tribal trust relationship and tradition of respecting and assisting tribal self-government. Independent of that special relationship Congress has recognized an obligation to assure that all people in this country have the benefits of the rule of law and accordingly has supported state and federal court systems.

By creating the institute I have recommended to enhance essential services to Indian courts -- the kinds of services the United States helps fund for state and federal courts -- Congress can give Indian courts greater independence and professionalism. By enacting legislation that removes shackles on tribal criminal penalties Congress can help bring greater order and justice to reservations. By enabling cooperative jurisdictional arrangements among governments Congress can respond to practical problems in a flexible, practical way and foster the kind of intergovernmental relations that recognizes the dignity of tribes, states and counties.

STATEMENT OF JOSEPH LITTLE, CHIEF, BRANCH OF JUDICIAL SERVICES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE U.S. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON THE INDIAN CIVIL RIGHTS ACT.

January 22, 1988

Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to present the views of the Department of the Interior on Tribal Court Systems.

Four major areas that need to be addressed in strengthening evolving tribal court systems are in the areas of funding, training, record keeping and appellate systems.

Funding

The Bureau addressed the tribal court funding process before this Committee in 1987. As noted at that time, a major concern is that court systems continue to maintain adequate minimum operating budgets. One approach to this problem would be to establish a base funding level outside the Indian Priority System. Such an option is under consideration within the Bureau, and could be one way of assuring that funding meets needs in this area. Any changes of this nature would, of course, technically require a budget structure change and would be addressed within the budget and appropriation process.

A primary concern of the Bureau is the enhancement of tribal participation in setting priorities for funding all programs. In this regard, all options for funding tribal court systems would be considered with this primary goal in mind.

Training

The Bureau wishes to provide adequate tribal court training. A primary concern has been our capability to meet evolving court personnel training needs and provide reviews of court systems resulting in recommendations for more effective judicial systems in Indian Country. We are also concerned with providing on-site technical assistance and training to implement easier access to information for tribal court systems. The Bureau intends to further address these objectives in future budget proposals.

To meet some of the concerns, the Bureau is attempting to implement some of the recommendations made in 1980 by the American Indian Lawyer Training Program in conjunction with the National American Indian Court Judges Association entitled "Tribal Justice Center Concept." Some of the recommendations from this document being implemented through the Branch of Judicial Services include providing additional court personnel training; on-site technical assistance; and reviews of court systems.

Record Keeping

It is important that tribal court systems be recognized as courts of record. This is not only important in aiding the tribes in developing an accurate record of court proceedings but may aid in courts achieving reciprocity from state court systems. Conforming to such record systems also allows analysis of court activities that can identify needs or trends that can then be more readily addressed by the Bureau.

Appellate Systems

The Bureau is also concerned with providing an effective appellate system for tribal courts, particularly in the area of addressing procedural issues and providing more effective judicial review. A primary concern is to fill the need for written opinions that can serve as the basis for articulating concepts of equal protection and due process. In this regard, BIA is aiding the development of two or three multi-tribal appellate systems during FY 1988 on an experimental basis.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

PREPARED STATEMENT OF GEORGE AUBID, SR., CHIEF JUDGE
MILLE LACS BAND OF CHIPPEWA INDIANS

As Chief Judge of the Non-Removable Mille Lacs Band of Chippewa Indians, I am devoted to the inherent right of bands, tribes and individuals to resolve disputes in tribal court.

The Mille Lacs Reservation is located in Central Minnesota. Over six years ago we decided to adopt a seperation of power form of government. Our government features an Executive, Legislative and Judicial Branch.

There is a fair and equitable system of checks and balances among the three branches. The Band Assembly is the Legislative Branch of our government; all appropriations originate in the Band Assembly and all laws are written by the Assembly. The Executive Branch includes a Chief and several Commissioners who execute and enforce our laws. The Judicial Branch is responsible for the interpretation of our laws and the adjudication of disputes.

Each Branch is dependent upon the other two and our government cannot operate properly if the powers of any Branch are diminished.

Therefore, any attack upon the Judicial Branch is an attack upon our government as a whole. Any attack upon our government is an attack upon our sovereignty. Sovereignty is our right and ability to control our own destiny. We existed as a sovereign nation prior to the existence of the United States and we retain and vigorously defend our sovereign status.

As a sovereign nation, we have the inherent right to be self-governing. The Supreme Court has consistently upheld our right to have a court system, and operate under our own system of laws.

In 1832, the Supreme Court recognized that Indian tribes are independent political communities which retain their natural rights in matters of self-government. Worchester vs. Georgia, 31 U.S. 515 (1832).

In 1896, the Supreme Court held that the United States Constitution does not apply to internal tribal matters. Talton v. Mayes, 136 U.S. 376 (1896).

Beginning in 1962, Congress began holding hearings about possible abuses of discretion in tribal courts.

To remedy these alleged abuses, Congress passes the Indian Civil Rights Act in 1968 (Title 24,USC. Section 1301-41). This Act provided thribal court litigants with nost of the rights guaranteed in the first ten amendments to the U.S. Constitution. Among the civil rights which were conferred by the ICRA are the rights of free speech, press and assembly; protections against unreasonable searches and seizures; the right to a speedy trial; the right to hire a lawyer in criminal cases; protections against self-incriminations and cruel and inhuman punishment; and the rights to equal protection and due process of law. (At Section 1302)

All of these rights are provided for in the Band Code of the Mille lacs Chippewa. Most of the guarantees are found in Chapter 5 of our Code which deals exclusively with civil rights.

A portion of the Statute follows:

Section 1: Individual Freedom under Band Law. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from enacting any Ordinance which prohibits the free exercise of religion or abridging the freedom of speech or of the press or the rights of the people to peacable assembly and to petition for a greivance.

Section 2: Individual Protections under Band Law. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinacne which violates the rights of the people to be secure in thier persons, houses, papers and effects against the unreasonable search and seizures. Any warrant shall be founded upon probable cause suppoerted by oath or affirmation.

Section 2.01: No judicial officer, but upon probable cause, oath or affirmation shall issue any warrant, Said warrant shall describe the place to be searched and the person or thing to be seized.

Section 3: Prohibition against Double Jeopardy. The Band Assemlby for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance subjecting any person for the same offense to be twice put in jeopardy.

Section 4: Self-Incrimination in Criminal Proceeding. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which compels any person in any criminal case to be a witness against himself.

Section 5: Expropriation of Private Property. The Band Assembly for the MIlle Lacs Band of Chippewa Indians, in exercising the

Section 5:(continued) powers of self-government is now and hereafter prohibited from adopting any Ordinance which confiscates any private property for public use without just compensation.

Section 6: Individual Rights during Judicial Proceedings. the Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising te powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies to any person in a criminal and civil proceeding to the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process of obtaining withnesses in his or her favor, and at his or her own expense, to have th assistance of counsel for his or her defense.

Section 7: Bails, Fines and Penalties. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which requires excessive bail, imposes excessive fines inflicts cruel and unusual punishments and in no event imposes for conviction of any one offense any penalty or punishment greater than imprisionment for a term of six month or a fine of $500.00 or both.

Section 8: Due Process of Band Law. The Band Assembly for the Mille lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

Section 9: Bills of Attainder. The Band Assembly of the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-gpvernment is now and hereafter prohibited frim adopting any Ordinance of attainder or ex-pose facto law.

Section 10: Rights to Trial by Jury. The Band Assembly of the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies to any person accused of an offense punishable by imprisonment, the right upon request to a trial by jury of not lessthat six persons.

Section 10.01: The Band Assembly of the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies the privilege of the writ of habeas corpus from any United States Federal District or Appeals Court.

The Mille Lacs Band feels strongly that the ICRA remedied any problems Tribal Court were having and that any additional legilation would infringe on the Bands right to be self-governing.

Again, the supreme Court upheld the right of Indian Tribes to adjudicate disputes in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). That case interpreted the ICRA as meaning that when a tribe violates a person's rights., that person can seek Federal review only if he is being wrongfully detained. This is in accordance with Section 1303 of the Act which states:

> "The privilege of the right of habeas corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian tribe,"

Hence, the intent of Congress, as interpreted by the Supreme Court, was to only get involved in the decisions of Indian courts if someone is wrongfully jailed.

Any amendments to the ICRA would be a disservice to Indian tribes. In 1968, Congress achieved two goals by passing the ICRA. First, it imposed upon the tribes parameters for their court systems. Second, it guaranteed the right of tribal courts to exist into perpetuity.

It is the position of the Mille Lacs Band that any compromise of these two initial goals would be an aggregious error by Congress. The ICRA struck a nice balance, Congress got its civil rights laws into tribal court. The tribes got the right to permanently operate their Court systems.

Should Congress impose more civil rights laws upon tribal court, it will be infringing on the tribal right to self-government which is the coernerstone of Federal-Tribal relations. Should Confress attempt to eliminate tribal courts, it will have broken a promise to the Indians.

It Was our impression that breaking promises to Indians was out of fashion in this Century.

As o people, we have different folkways and mores from the predominant white society. Consequently, we have cultural and traditional matters which can only be heard in our court system. No other tribunal in the world can make decisions which interpret our ancient laws and age old traditions.

We believe that mankind constantly searches for truth. We as a people need some tribunal in our midst to seek truth. If you remove a court from a community, you remove the community's ability to ferret out truth and purge itself.

We also believe that mankind seeks justice. We enjoy the rights to dispense justice. Many of our Band members, don't believe justice is possible in the white man's court. We believe our Band Court satisfies a need for justice among our people.

Therefore, the Mille Lacs Band Court is in complete compliance with the ICRA, and the Court is a fundamental element of our government as well as our best forum for seeking truth and justice.

Further legislation is not needed and we will oppose any further restrictions on our court system and our right to be self-governing.

In addition, the Mille Lacs Court concurs with the testimony given by Daniel Getches. We support the concept of a National Indian Justice Center which would train our judges and staff. We Support the amelioration fo judicial funding by the BIA, we feel the need for greater funding on a daily basis and urge Congress to instruct the BIA to place our needs at a higher position on the list of priorities. We support the increasing of criminal jurisdiction by tribal courts. A mechanism which would allow us to retrocede Public Law 280 with greater ease is needed. We support a Tribal-State Cooperative Jurisdiction Act. We would like to work with the State of MInnesota and be assured that our courts are shown the proper respect by the State. We agree that CFR courts should be eliminated. Finally, we agree that the federal government must curtail its plenary powers and respect the sovereignty of the Indian tribes and bands.

TOHONO O'ODHAM
JUDICIARY
P. O. Box 761
Sells, Arizona 85634
(602) 383-2221 Ext. 425

Hilda Ann Manuel

January 18, 1988

Mr. Clarence Pendleton, Chairman
United States Commission on Civil Rights

RE: January 28, 1988 Hearings

Dear Mr. Pendleton:

We have been advised by the Bureau of Indian Affairs, of the January 28th hearings to be held in Washington, D.C., concerning the enforcement of the Indian Civil Rights Act by tribal governments and the monitoring role, if any, undertaken by the Bureau of Indian Affairs.

I am the Chief Judge of the Tohono O'odham Judiciary of the Tohono O'odham Nation in Arizona. I had the opportunity to view the hearings conducted in Flagstaff, Arizona, on August 13 & 14, 1987, by the Commission on the same issue. I could not present testimony at that time because your interest and the Commission's was directed to Zuni and Navajo and their experiences with enforcement of the Indian Civil Rights Act.

Since the Bureau of Indian Affairs is requested to provide data and information specific to ICRA cases, I saw the opportunity to share with you and members of the Commission my opinion regarding the investigation of tribal courts.

I believe you are aware that there are at least 150 tribal court systems functioning throughout Indian country. The level of sophistication and effectiveness of these tribal courts is diverse and greatly depends on available dollars and resources. There are court systems that exercise a full range of civil and criminal powers in accordance with due process and fairness standards often credited to only Anglo court systems. And, There are those systems with grave shortcomings plagued with management

and operational deficiences. It is inherently unfair to make general conclusions about all tribal courts on the basis of testimony and evidence received during two hearings. Surely, the Commission would not propose similar action for all State court systems after abuses and civil rights violations were found in one or two systems.

A great deal of emphasis was made, during the Flagstaff hearings, of the concept of separation of powers. It is true that for the most part, Indian governments do not function or exercise their governmental powers under this notion. Tribal Councils often exercise all governmental powers including establishing tribal court systems. Ostensibly, the concept of separation of powers appears to be the simple answer. But upon closer examination one cannot help but see the real complexities and obstacles faced by tribal court systems which do not lend themselves to easy answers. By the same token, there are factors peculiar to individual tribes that must be taken into account before recommending wholesale the concept of separation of powers. Many of these factors and data has been documented extensively in numerous studies funded by the federal government. A few examples for your information are: Indian Self-determination and the Role of Tribal Courts, A survey of Tribal Courts conducted by the American Indian Lawyer Training Program, or Indian Courts and the Future, A Five Year Plan, a study conducted by the Bureau of Indian Affairs with the National Indian Court Judges Association, or the American Indian Policy Review Commission Task Force Report No. 4 on Federal, State, and Tribal Jurisdiction.

The findings and recommendations of these studies may be read and conferences held to discuss ways and means of implementing the changes. But more often, these studies are shelved and nothing is done to find the dollars needed to correct and remedy the deficiencies noted in the reports. Even the Bureau of Indian Affairs has long recognized the importance of tribal courts but has not sought adequate funds to assist Tribes in their efforts to develop and reform their tribal judicial systems as evident by the small amounts requested during annual appropriations times.

The Tohono O'odham Nation enjoys the distinction of being one of few tribes in the United States to adopt a constitution calling for a separation of powers between three branches of government, the Legislative Council, Executive and the Judicial. Prior to the 1986 adoption of this Constitution, the Tribal Council exercised almost exclusively, the sovereign powers of the Tribe. The realignment of power under the new Constitution has not been easy but clearly will be workable for this Tribe. The obvious benefit for the Judicial Branch is the elevation of the tribal court system to vanguard of unreasonable governmental actions over individual civil rights and liberties.

Although the Legislative Branch appoints the Judges of the Judicial Branch, the Judiciary Committee of the Council conducts the actual screening and recommending of qualified persons to be appointed. The Constitution provides the Judicial Branch with the full panolpy of powers inherent to independent judicial systems. Even before the adoption of the new Constitution the Tribal Council did not interfere with or try to influence the functions of the tribal court. There was so little interest in fact, that at budget times when funding was being sought by the Tribal Courts, it was difficult to convince the Council to appropriate sufficient funds to keep the system operating. With the changes of climate in Indian law however, and the complex legal issues facing tribal courts, the Legislative Council has recognized the importance of establishing a fair system with sound structural and procedural safeguards to permit effective disposition of cases brought in the courts.

The sophistication of this tribe in developing sound management and personnel systems has greatly enhanced its ability to check against abuses of its power. The integrity of the people working in the tribal government must also be commended because they have likewise prevented any abuses of individual rights and liberties.

In conclusion I hope the Commission will fairly assess the importance of tribal courts using accurate information and data about all the existing systems throughout Indian country. It makes more sense to identify "model" systems and provide the means and opportunity for Tribes to improve their systems in line with those courts which are operating efficiently in accordance with due process and fairness.

Included as part of this letter is information requested by the Superintendent of the Tohono O'odham Agency. Thank you.

Sincerely yours,

Hilda A. Manuel

Hilda A. Manuel
Chief Judge

cc: Area Tribal Operations Officer
Phoenix Area Office

James Barber, Superintendent

Harriet Toro, Chairwoman, Legislative
Tony Felix, Chairman, Judiciary Committee

Enos Francisco, Executive

January 18, 1988

Response To

Part Two: Data on Tribal Courts and ICRA Cases

Training:

1. No training is provided unless a tribe has earmarked P.L. 93-638 funds for training of their judges. Periodic training offered to Bureau employees may be offered to interested tribes on a priority or available space basis, at the tribe's expense. No specific training or information is given with respect to ICRA issues.

2. The Tohono O'odham Constitution requires a minimum of six (6) judges which at the present time is the number sitting as judges. Of the six, the Chief Judge is a licensed attorney, three have extensive experience as advocate practitioners. Four judges, as a result of education and experience have obtained sufficient training on the ICRA.

3. The law enforcement department and the justice department provide more than adequate information on individual rights under the ICRA. All judicial proceedings ensure that litigants are fully apprised of their rights under the ICRA, the laws of the Nation and the Constitution.

4. The Tohono O'odham Nation enjoys the distinction of being one of very few tribes to adopt a constitution incorporating the separation of powers concept. The provisions of the ICRA have also been incorporated into the constitution.

5. The Tohono O'odham Nation by virtue of its constitution guarantees all of the rights listed under the Sections Civil (a-h) and Criminal (a-o).

6. The Constitution under Article VIII Section 3 provides that the Legislative Council will appoint judges to the bench. In practice, the Judiciary committee of the Legislative Council receives nominations or applicants for screening and assessment of the applicant's qualifications. Minimum qualification and educational requirements must be satisfied for consideration. Qualified candidates are then recommended by the Judiciary committee to the Legislative Council for appointment.

Response To Part Two:
Data on Tribal Courts and ICRA Cases
Page Two

7. The Chief Judge of the Tohono O'odham Judiciary has arranged with the University of Arizona School of Law in Tucson, Arizona, to employ second/third year law students as law clerks. Three students will begin their internship on January 25, 1988. There are 2 file clerks employed by the Clerk of the Court.

8. The Tohono O'odham Nation has operated a Prosecutor's office since 1975 and, a public defender service (advocates) since 1977.

9. Attorneys are permitted to practice in the Tohono O'odham courts and have been appearing representing clients since before the ICRA.
No formal bar admission requirements have been adopted although there are plans to establish an examination and admission policy. Appearances by attorneys are required to be reduced to writing in the form prescribed by the Federal Rules of Procedure.

10. The Tohono O'odham Judiciary is a court of record. All proceedings are taped and can be transcribed at the request of a litigant.
There is no court reporter on staff but it is planned that two incumbent clerks, who are proficient in both English and O'odham will be trained as court reporters. Opinions are written in cases involving novel or complex legal issues. Copies may be obtained by contacting the Clerk's office.
Tribal ordinances are published and available from the Legislative Council's secretary.

11. The Constitution of the Tohono O'odham Nation provides that a Court of Appeals consisting of three (3) judges will be established with the judges being assigned by the Chief Judge.
The Court of Appeals reviews petitions for appeal to determine whether grounds for appeal have been properly alleged and if the petition is meritorious. The appeal is conducted on the record.

12. It is permissible for all six judges of the Tohono O'odham Judiciary to sit as appellate judges at the request of another tribal court. Time and caseload however, does not give the judges any free time to spent with other courts.

13. There have been less than ten (10) cases invoking the equal protection and due process provisions of the ICRA filed in the Tohono O'odham courts.

Response To Part Two:
Data on Tribal Courts and ICRA Cases
Page Three

ICRA

15. No identification is made of a case alleging ICRA violations since the case is processed in the routine manner as other civil cases.

16. Of the 10 or less cases filed alleging ICRA violations, one involved a non-member employee terminated by the Tribal Council. The majority were tribal members suing the tribal government or a district council.

17. Two cases involving employment actions.

18. ICRA enforcement is not a problem because of constitutional safeguards and procedural protections practiced by the tribal court.

20. As a result of the separation of powers concept mandated by the Tohono O'odham Constitution there is no influence or interference by tribal politics in the independence of the tribal court. The Judicial Branch has the power to review and declare unconstitutional any act or law of the Legislative branch.

21. Not necessary because of the Constitution and the procedural protections offered by the Judicial branch.

22. The Legislative Council of the Tohono O'odham Nation has never overruled a tribal court decision.

23. Nine of the ten cases filed alleging ICRA violations raised the sovereign immunity defense. While the cases were ultimately dismissed it is fair to say that the dismissals were based on other grounds such as failure to exhaust administrative remedies, etc., although sovereign immunity may have been raised.

states, cities, and counties, tribal powers are not subject to any constitutional restrictions. And any complaints, including those alleging arbitrary or discriminatory tribal actions, can be heard only in tribal courts, and only if the tribal government waives its sovereign immunity to allow for such a hearing. This, we suggest, is a recipe for what political historians would call 'absolutism,' leading in this country to unrest and eventual, but inevitable, change. Americans are simply unaccustomed to any such system of government and no arguments based upon federal court decisions or the writings of legal scholars are going to convince them otherwise.

Most states today are grappling with whether, or the extent to which, tribes have governmental power over the non-Indians who remain on the reservation. That problem is becoming more acute each year as tribes claim the power to tax non-Indians, to zone their land, to regulate and take over their water supplies, and to make them subject to tribal courts.[1]

A related and more recent development is also of serious concern. In the last twenty years or so, the tribes and their members have become entrepreneurs. Some of these tribal enterprises have been aimed at an off-reservation clientele. Further, what these enterprises offer to that clientele is immunity from state law. Tribal gambling operations of the sort involved in the recent Cabazon case are perhaps the most familiar example. Tax-free cigarette and liquor sales by Indians to non-Indians are another. Environmental regulation has become the focal point recently.

In another situation, Indian tribes are seeking to exploit exemptions from state regulatory jurisdiction by inviting non-Indian citizens, businesses and industry to locate on the reservation so they too may enjoy immunity from state regulation. We are talking here of large businesses and industry desirous of avoiding state regulations, particularly state environmental laws.[2]

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1 In Washington state, for example, in 1980 some 79,000 persons lived within 23 reservations in Washington, but only about 16,000 of them were Indians. We must emphasize that this ratio is a state-wide average. On some reservations it is much higher; and on other reservations, the Indian population outnumbers the non-Indian population. See General Population Characteristics, United States Summary, 1980 Census of Population, Table 71, U.S. Bureau of Census.

When these industrial activities are allowed to operate below state environmental and other standards, the quality of life and environment for individual Indian and non-Indian citizens both on and off the reservation are impacted.[3]

Currently, federal administrators, principally EPA, are relying on the concept of tribal sovereignty to immunize non-Indian businesses from state environmental regulation. In Washington State, the Puyallup Reservation alone has approximately 72 industries which have waste discharge permits issued by the state pursuant to state law under the Natural Pollutant Discharge Elimination System (NPDES), authorized by the Federal Clean Water Act, 33 U.S.C. section 1251 et seq. Many of these facilities also generate or treat hazardous chemical wastes. The Puyallup Reservation actually includes a large portion of the population of Tacoma and most of the city's port and industrial area.

The problem is not limited to existing industries on reservations. At least two other relatively common fact patterns are of concern. First are announcements of plans by off-reservation industries to locate on Indian reservations to avoid state regulation. For example, in Washington State, industries providing incinerators of hazardous waste have made such announcements. Second, there have been pollution incidents on reservations which have required a cleanup response. Although the federal government does have response authority for some spills, it does not have such authority (or does not exercise such authority) over all spills. In sum, federal response authority is not as broad as the state's in many cases. Because few, if any, tribal governments have environmental response capabilities, if the

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2 See advertisement in Daily Journal of Commerce, December 8, 1977, at p. 5, which provides as follows: "Industrialists - Developers, Are you 'fed up' with bureaucratic interference, labor problems, and high taxes? Then locate at the new Swinomish Tribal Port and Industrial Park. Tribal control of environment, shoreline management, zoning, taxation, and labor relations will simplify your development task and allow you higher profit margins." See Exhibit B.

3 Federal environmental standards may apply but if Washington's experience is illustrative, the EPA does not always aggressively enforce those standards. So, not only would applicable standards be weaker, but enforcement of those standards would be more lax.

environmental damage is to be controlled, the states need to act.

The confused state of affairs with respect to environmental regulation on reservation is further illustrated by the Federal Clean Water Act, which requires applicants for federal permits or licenses to obtain a water quality certification from the state certifying that the proposed project will not violate state water quality standards. EPA's current position is that Washington State's water quality standards for waters within Indian reservations are no longer in effect. Since EPA has not promulgated any such standards, the current federal position is that no waters within Indian reservations in Washington State have water quality standards. This federal position impacts the quality of Washington's environment for Indians and non-Indians residing in our state both on and off reservations.

Interestingly, these industries also find themselves in a catch-22. By avoiding state regulation, the industry ends up in an uncertain regulatory environment. Thus, the environmental regulatory uncertainties created by federal Indian policy may also operate in direct contradiction to yet another federal Indian policy, that of promoting economic development on reservations. The uncertain environmental regulation climate on Indian reservations today may detrimentally impact both Indians and non-Indians in our state.

The most serious recent case of concern is Yakima Indian Nation v. Whiteside, 828 P.2d 529 (Sept. 21, 1987), in which the Yakima Nation and Yakima County both promulgated zoning ordinances for a portion of the reservation with a predominantly non-Indian population. The Ninth Circuit has ruled that the Yakima's zoning ordinance applies to non-Indians residing in this area of the reservation. The case has been remanded to the district court to determine if Yakima County's zoning ordinance also applies, thereby creating concurrent zoning jurisdiction, or to determine if the county ordinance is preempted by the tribal ordinance. This, incidentally, is the same Ninth Circuit which several months earlier in Holly v. Totus ruled that the Yakima's ordinance regulating waters in excess of tribal needs, i.e., waters available to non-Indians on reservation, was preempted by state water regulations.[4]

4 Holly v. Totus is an unpublished opinion of the Ninth Circuit, No. 85-4436, decided March 3, 1987, cert. denied October 5, 1987.

The previous examples have focused on how federal Indian policy is impacting Indians and non-Indians. One further example illustrates the sometimes negative impact of federal tribal policy on individual Indian citizens. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), Mrs. Martinez, an enrolled tribal member, challenged in federal court a tribal policy which provided that tribal membership was patrolinear, that is, membership was open to children of enrolled fathers (regardless of the mother's status) and not open to children of enrolled mothers married to nonmembers. Mrs. Martinez's action was brought under the equal protection guarantees of the Indian Civil Rights Act. The court held that Mrs. Martinez's sole remedy was tribal court, a court controlled by tribal leadership, presumptively an unfriendly forum for Mrs. Martinez's challenge to the very policies established by tribal leadership. While federal policy here may further organized tribal power, we submit that the rights of individual Indians have not been well-served.

We have spoken with you previously about the Department of Justice's policy of appearing in tribal litigation in its trust capacity. Although presented in the name of "the United States", the positions advanced by the Justice Department are typically limited to the views of the Bureau of Indian Affairs. In many of these cases other substantial federal interests go unrepresented. We have witnessed the spectacle of an Assistant U.S. Attorney cross-examining a United States Parks Service employee, called as a state witness, who testified to the need for maintaining and improving fish spawning escapements into Olympic National Park streams while the "United States" was fully supporting tribal claims for a fishery on these very stocks.[5] Attached is the Western Attorneys General Resolution 87-10 addressing this concern and urging the Justice Department to review its Indian litigation policies to ensure that all competing federal interests, especially those consistent with the interests of states and non-Indian citizens, are fairly and properly considered.

Federal Indian policy is currently under scrutiny in many quarters. The BIA is directly under attack from the tribes. The Senate Select Committee on Indian Affairs chaired by Senator Inouye has authorized a one year study of Indian policy to be completed in November, 1988. Federal Indian gambling legislation is controversial in the Congress. The tribes are seeking to enlist EPA support as an advocate against state environmental regulatory

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5 U.S. v. Washington (north coastal case).

OFFICE OF THE ATTORNEY GENERAL

jurisdiction. The National Governor's Association at its July, 1987 meeting instructed staff to initiate a study on Indian jurisdiction. The Conference of Western Attorneys General is itself considering such a study. The tribes gathered earlier this year for a major conference on Indian sovereignty. The federal courts each month issue new and often conflicting decisions on Indian jurisdiction.

Clearly, unrest is in the air. Leadership and direction must come from the federal government. To fully understand where federal policy must go requires an understanding of where federal policy has been and what the impact of that policy has been on tribes, the states, affected interest groups and on individual Indian and non-Indian citizens. Because these problems emanate from federal legal policy, the Justice Department is uniquely situated to provide an important contribution to the national dialogue by commissioning a study on the impact of federal Indian policy on Indians and non-Indians. Such a report could highlight the problems with current policy, or the lack thereof, and result in recommendations to the President and the Congress on future federal Indian policy.

While we do not pretend to know the answers to these difficult and complex issues, we are willing to pledge our support to any such effort.

Again, I wish to extend my gratitude to you on my own behalf and that of the citizens of the State of Washington for your willingness to hear our concerns on this important subject.

Very truly yours,

KEN EIKENBERRY
Attorney General

CONFERENCE OF
WESTERN ATTORNEYS GENERAL
THE COUNCIL OF STATE GOVERNMENTS

720 SACRAMENTO STREET SAN FRANCISCO, CALIFORNIA 94108 (415) 566-3760

APPROVED RESOLUTION NO. 87-10

PROPOSED BY WASHINGTON

FEDERAL REPRESENTATION IN TRIBAL LITIGATION

WHEREAS, In the stated exercise of its trust responsibility to America's federally-recognized Indian tribes, the United States, through the Department of Justice, routinely appears and participates in litigation on behalf of tribal interests; and

WHEREAS, There are often federal interests consistent with the interests of the several states and their non-Indian citizens which compete with the tribal interests in litigation; and

WHEREAS, It has been the longstanding practice of the Department of Justice predating the current administration to forego the advancement of other competing federal interests in such litigation; and

WHEREAS, Appearances by the Department of Justice on behalf of "the United States" in such litigation wrongly imply that the comprehensive interests of the federal government are being represented before the court; and

WHEREAS, This practice results in lack of representation for agencies and officials seeking to carry out those federal programs or policies which happen to be adverse to the tribal interests being advanced; and

WHEREAS, This practice fails to recognize and, on occasion, adversely affects the interests of the several states and their non-Indian citizens; and

WHEREAS, The ends of justice are disserved by any failure to insure that all affected and competing interests are represented before the court in litigation; and

WHEREAS, Attorney General Edwin Meese, III, has acknowledged the need for the Department of Justice to review the Department's litigation policies with reference to representation of federally recognized Indian tribes and all other federal interests in the context of the foregoing concerns;

EXHIBIT A

NOW, THEREFORE, BE IT RESOLVED by the Western Conference of Attorneys General that the United States Department of Justice is encouraged to review its litigation policies involving federally-recognized Indian tribes and to insure that all competing federal interests, especially those which are consistent with the interests of the several states and their non-Indian citizens, are properly and fairly considered and represented and that a comprehensive federal position is advanced before the court in all such cases;

BE IT FURTHER RESOLVED that the Western Conference of Attorneys General pledges its cooperation and support to work with the Department of Justice in the foregoing regard.

(RESOLUTION ADOPTED ON AUGUST 14 AT THE 1987 CONFERENCE OF WESTERN ATTORNEYS GENERAL ANNUAL MEETING IN OAKLAND, CALIFORNIA.)

OREGON and COLORADO ABSTAINED.

THE NAVAJO NATION

PETER MacDONALD, CHAIRMAN
THE NAVAJO TRIBAL COUNCIL
JOHNNY R. THOMPSON, VICE CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

February 2, 1988

U.S. Senate
The Honorable Daniel Inouye
722 Hart Office Building
Washington, D.C. 20510

Dear Senator Inouye:

The Judiciary Committee of the Navajo Tribal Council has received a report from Chief Justice Tom Tso regarding his trip to Washington, D.C. and the meeting of the Senate Select Committee on January 22, 1988.

We understand that you are in support of tribal courts receiving increased appropriations from Congress. As the legislative committee charged with overseeing the interests of the Judicial Branch, the Judiciary Committee wishes to express its appreciation for your support of tribal courts.

It is the joint desire and objective of the Judiciary Committee and/or Chief Justice Tso that the Navajo Tribal Courts be strong, competent and independent courts. We have worked hard within and without the Navajo Nation to achieve this objective.

The financial "crunch on our courts is enormous". The case load is very heavy and we have attempted to increase judicial services. At the same time the money the Judicial Branch receives under P.L. 93-638 continues to be reduced.

The Judiciary Committee stands ready to assist you in your efforts to improve tribal courts. We

Post Office Box 308 • Window Rock, Navajo Nation (ARIZONA) • (602) 871-4941

would be happy to meet with you, appear at hearings, or do whatever is necessary.

Please keep in touch with the Chief Justice and with the Judiciary Committee.

Our best regards to you.

Sincerely,

Stanley Yazzie
Chairman, Judiciary Committee

SY/mrh

xc: Honorable Chairman Peter MacDonald
The Navajo Nation

Chief Justice Tom Tso
Judicial Branch of the Navajo Nation

4001 N. 9th Street, #1402
Arlington, VA 22203
January 27, 1988

The Honorable Daniel K. Inouye, Chairman
Senate Select Committee on Indian
Affairs
838 Hart Office Building
Washington, D.C. 20510

Dear Senator Inouye:

I wish to express my appreciation to the Senate Select Committee on Indian Affairs for their interest in the views of tribal leaders concerning issues affecting tribal courts and for their support for protecting the authority of tribes over their citizens, resources and territories. Attached for the record and the Committee's consideration during your hearing on tribal courts is a concept paper to develop an Indian Regional Appellate Court System.

As to my background, in June, 1987 I completed serving four terms, 8 years, as an elected Council member to the Hoopa Valley Business Council, the governing body of the Hoopa Valley Tribe of California. During my tenure I assisted in revamping the Bureau of Indian Affairs' fishing regulations for our Reservation which made them the most manageable of any in California and also helped to develop our own tribal fishing regulations, law enforcement department and tribal court system. Once our tribal regulatory system was completed, I represented the Hoopa Tribe in the development of the recently ratified five-year salmon harvest allocation agreement for the Klamath River system in which six management agencies and four user groups participated. During the salmon allocation negotiations we successfully convinced the State of California to amend its 50 year old discriminatory laws that prohibited Indian commercial fishing.

While developing our court system I had a chance to review the structures, decisions, and problems of many tribal courts. I also discussed with many tribal lawyers, elected representatives, judges and other court personnel various issues, problems and conflicts that they have encountered over the years.

Although funding was raised as the primary problem, other frequently raised problems were:

--Conflicts between the responsibilities of governing bodies and tribal courts,

--Inconsistent interpretation of applicable court decisions that affect tribal jurisdiction, and

--Inconsistent interpretation of civil and criminal jurisdiction over non-members.

Each Indian tribe and its court has no more or less inherent powers over any other tribe. However, a single federal court decision involving one tribe could have adverse effects on all others. This can cause serious problems since each tribal court usually must make an independent interpretation of how a decision may affect tribal jurisdiction. At times a court's interpretation may conflict with the policies and directions of the tribal governing body.

Over the years many committees, commissions, organizations and individuals have studied what they perceive as solutions to concerns about tribal courts and tribal powers. Many of the so-called solutions have been directed toward limiting or controlling the extent of tribal jurisdiction in many areas. However, by taking the approach of limiting or controlling tribal jurisdiction on one hand only undermines the policies that are geared toward enhancing an Indian tribe's ability to become self-sufficient and self-determining on the other hand.

I believe a more compatible approach that will compliment the goal of self-determination is one that develops a check and balance system in which tribes can participate. Threats of controversial and impractical legislation designed to restrict tribal powers will impede constructive discussions by forcing tribes to oppose any proposal being offered. Tribes must be willing participants to a process that they respect if positive solutions are expected to be identified.

While developing this concept paper there was never an intention to circumvent an individual tribe's authority over its internal affairs. This system must be deliberately designed to compliment tribal courts since anything less would be a disservice to the recognition of an Indian tribe as a unique self-governing political entity.

The philosophy behind the Indian Regional Appellate Court System is that it will not be "established" by Congress but rather is a tribal system that will be recognized by Congress through legislation. Appropriate legislative language can be developed that would ensure enforcement powers of the appellate court's decisions and would require that appeals from tribal courts be only heard in the Indian Regional Appellate Courts rather than in Federal courts.

Appeals from tribal courts to the Regional Courts would be governed by criteria developed by tribal representatives, thereby, ensuring the preservation of identity, customs and traditions of each participating tribe.

Federal court review of the Appellate Court's decisions should be limited to specific areas in order to protect the tribes from unwarranted federal intervention.

Those tribes utilizing existing appellate systems may wish to consider incorporating that system as one of the Regional Courts, thereby, making the benefits of the Regional Courts available to their existing appellate system.

Over the past couple of years I have discussed this proposal with many tribal leaders, attorneys, judges and Indian law instructors and not one has opposed the appellate court concept. Most have expressed encouragements and were very interested in discussing the idea in more detail.

This concept paper should serve as a discussion paper and obviously will be subject to many changes. Hopefully future discussions about tribal jurisdiction and the exercise of tribal powers will be on a constructive note with goals that are intended to preserve tribal heritage on a national level as well as for each individual Indian tribe.

I would be glad to discuss this concept with you or your staff in more detail. I appreciate the opportunity to submit my views on this important tribal issue and if I can answer any questions, please feel free to let me know.

Sincerely,

Danny Jordan

Danny Jordan

interests involved in a given fact situation on-reservation. Only recently, the Supreme Court has sanctioned this weighing and balancing approach for determining the extent of state jurisdiction over Indians on reservations.

There is a growing philosophy in this country, reflected in the Congress, the Executive, and the Judiciary, that states must assume greater control of what occurs within their borders. There is also a growing backlash in this country, fueled by competition for scarce economic and natural resources in the United States.

Recently the Supreme Court has reaffirmed that Tribal processes must be used before federal courts will exercise jurisdiction over disputes arising in Indian country.

These facts seem logically to call for an effort by tribes to assume greater responsibility for the resolution of disputes in Indian country, the result of which define tribal sovereignty. The course of history has shown that any point of directional change in policies and philosophies can also change the definition of sovereignty as well. When a state seeks tribal resources the usual thrust is to challenge the authority of the Tribe over its territory and non-Indians. Each claim, challenge, victory or loss involving sovereignty has an impact on the future definition of the doctrine.

Other forces are at work influencing the definition of tribal sovereignty. Concerns about the protection of individual civil rights of Tribal members vis-a-vis their Tribal governments and courts resulted in the President's Commission on Reservation Economies' recommending the development of a federal judicial appellate system for review of tribal decisions. In addition, the United States Civil R ghts Commission undertook an active investigation of what it considered to be abuses in Tribal court systems, and called for an amendment of the Indian Civil Rights Act to give federal courts jurisdiction over them and legislation has been introduced which would place federal magistrates on Indian reservations.

It seems clear that if an adequate Tribal remedy to address the perceived Tribal violations is not found, a non-Indian solution will be imposed resulting in continued loss of Tribal sovereignty. The complaints raised by Indians and non-Indians alike about abuses of authority and lack of protection of rights, while most are without foundation, have created doubt that Tribal governments have the ability properly to exercise their powers. A few of these situations shows that there are some problems; however, even though most tribes are effectively asserting their authority for resource protection and improving their reservations' economies, they have faced unpleasant consequences of the concerns. Congressional representatives, executive agency representatives, and non-Indian businesses have sought to eliminate or limit Tribal jurisdiction. Only recently,

utility companies in one state successfully pressured for introduction of legislation to limit and temporarily prohibit the authority of tribes to tax non-Indians on their reservations.

Several Tribes know that eventually some effort, either legislative or judicial, will be successful if adequate safe-guards are not developed. The major problem with these attempts is that they will be once again a non-Indian dominant approach, probably proposed by the Federal Government.

Tribes must begin investigating an Indian alternative upon which the Tribes can agree. Only by developing an Indian alternative can Tribes direct action constructively so as not to result in the loss of sovereign powers.

Perhaps these challenges provide an opportunity for Indian tribes across the nation to develop new strategy for protecting their rights of self-government. In that vein, the following is proposed for consideration:

(1) Recognize by federal legislation a regional Tribal appellate court system authorized to hear appeals from Tribal courts within designated areas and with review authority in specific areas.

(2) An appellate system would provide an opportunity for consistent, interpretation of the scope of authority of Tribes over both

Indians and non-Indians, preventing the inconsistency among decisions which results from the isolation of individual Tribal judges.

(3) The legislation would provide that Tribes would choose whether or not to be within the regional system.

(4) To provide stability to the system, it may be simple for Tribes to join the system, but more difficult for them to withdraw, perhaps through the requirement of a Tribal council resolution to be included, but a Tribal referendum to withdraw.

(5) There should be incentives for those tribes that remain, such as more program dollars and reassumption authority, which in turn would be lost upon withdrawal.

(6) Regions could be designated by the Tribes themselves and existing appellate court systems could be included if the participating tribes so choose, thereby making the benefits available to them.

(7) The legislation would provide for recognition of the decisions of the courts within the system by federal courts and executive agencies.

(8) The legislation would provide a process for the establishment of standards for the regional courts, such as the qualifications for judges and other court personnel, as well as the development of civil

and criminal judicial procedure and rules. Perhaps it would be appropriate for the legislation to authorize a Judicial Conference to make a continuous study of standards, procedures and rules. The Conference could be composed of Tribal representatives, committees of judges, lawyers and legal scholars whose job it would be to study and to recommend to the court system, and, where appropriate, the Congress, both the initial standards, procedures and rules, and amendments.

(9) Perhaps the legislation could provide a limited opportunity for appeal from the regional appellate courts to federal district court.

We encourage discussion among Tribal leaders, attorneys, judges, and Indian organizations to facilitate the development of possible solutions for overcoming outside threats to Tribal sovereignty. A glaring reality is that if Tribes don't take the initiative to direct future events in a way to protect Tribal powers, actions will be taken by non-Indians to restrict those powers.

THE NAVAJO JUDICIAL SYSTEM

by:

Honorable Tom Tso, Chief Justice
The Navajo Nation

For Presentation at the
First Annual Western Regional
Indian Law Symposium

November 19 & 20, 1987
Seattle, Washington

THE NAVAJO JUDICIAL SYSTEM

Introduction

I was asked to prepare a presentation on (1) separation of the Judicial Branch from the Tribal Council; (2) Judicial review in the Indian courts; and (3) the role of customary law in the Indian Courts.

There are many tribes and many tribal court systems. As I am most familiar with the Navajo judicial system, I have limited my discussion to the Navajo Tribal Courts. I have attempted to explain the Navajo judicial system in terms of the above topics.

The way the Navajo Courts function and the history and reasoning in the development of our system can serve as one model. Our court structure and development and the philosophy and policies behind the structure and development may enlighten the participants at this symposium as to the ways in which tribal courts reflect the Anglo system, the ways in which tribal courts are different, and the ways in which tribal courts may achieve a merger of both systems.

Indian Tribal Courts can retain its identity and maintain its uniqueness without joining the rest of the general American public in its "melting or stew pot" identity meaning its set of values, ideas, concepts and principles of fairness and justice. Wherever possible Anglo law should be modified to meet Indian needs.

The three topics on which I was asked to speak are so interrelated in

the Navajo Courts that it is impossible to make a clear separation. For that reason, I have titled my presentation "The Navajo Judicial System" and have attempted to cover the three topics within that context.

In the outline I refer to Navajo cases and you have been supplied with copies of the cases. In the outline the cases are referred to by their "short title". For your convenience I have listed the cites below and after each cite indicated how it is referred to in the outline.

1. Dennison v. Tucson Gas and Electric Company, 1 Nav. R. 95 (1984) - Tucson Gas and Electric
2. Halona v. MacDonald, 1 Nav. R. 189 (1978) - Halona
3. Goldtooth v. Goldtooth, 3 Nav. R. 223 (1982) - Goldtooth
4. Tome v. Navajo Nation, 4 Nav. R. 159 (1983) - Tome #1
5. Tome v. Navajo Nation, WR-CV-153-83 (1984) - Tome #2
6. In the Matter of the Estate of: Charley Nez Wauneka, Sr., A-CV-26-84 (1986) - Wauneka
7. In the Matter of the Estate of Annie Belone, A-CV-01-85 (1987) - Belone
8. In the Matter of the Estate of: Mae D. Benally, A-CV-21-85 (1987) - Benally
9. The Tribal Court Survives in America, The Judges' Journal, Vol 25, No. 2

"NAVAJO JUDICIAL SYSTEM"

Outline

I. The history and background of the Navajo Tribal Courts help explain present system.

A. The history of the Navajo judicial system reflects the history of the Navajo Nation.

1. Navajos were not a structured tribe but a collection of independent communities that came together in times of emergency and then disbanded.

2. In 1923 the federal government forced Navajos to organize and elect a Tribal Council so that oil, gas and mineral leases could be signed.

3. The Navajo Nation also had federal government courts called Courts of Indian Offenses.

4. The Navajo Nation gradually took control of its government.

5. In 1959 the Navajo Tribal Courts were established.

B. The Navajo judicial system has greatly increased its services and capabilities since 1959.

1. The Navajo courts started with seven judges and a Chief Justice.

2. The Navajo judiciary now has the following:

a. Seven judicial districts:

1. Seven District Court judges (trial courts of general jurisdiction);

2. Five Children's Court judges;

3. One Circuit judge.

b. Supreme Court

1. Chief Justice

2. Two Associate Justices

c. Peacemaker Court

C. Prior to the institution of formal courts, Navajos settled disputes in the community under the guidance of a Peacemaker.

D. The Navajos had no written laws but applied oral laws and rules which are sometimes referred to as tradition and custom.

E. As a governmental structure was imposed on the Navajos, there began to be written laws which were mostly Anglo laws.

F. The federal government also began to make requirements for written documents.

G. The combination of written laws which led to court orders and the regulations of the federal government caused the Navajo Nation to eventually outlaw or modify certain customary ways.

1. Customary divorce in which the wife threw out the husband's saddle is no longer recognized.

2. Plural marriages are not allowed.

H. The Navajo Nation is a developing nation and as such we have incorporated many of the Anglo ways, especially in administration and regulation.

1. Navajo Nation Corporation Code.

2. Navajo Uniform Commercial Code.

3. Navajo Tax Acts

II. A separate and independent judiciary is based in Navajo tradition and custom and in tribal law.

A. Traditionally, Navajos have recognized areas of expertise and have deferred to the experts in those areas.

1. A medicineman is one who has learned the chants, the prayers, and the ethics of the trade under a master medicineman.

a. When a medicine man receives his medicine bundle it means that he possesses all the necessary knowledge and can make proper use of the knowledge.

b. The only one who can question a medicineman is another medicineman.

2. Dispute resolution is another area of expertise long reorganized by Navajos.

a. A person who helped resolve disputes in the community was called a Peacemaker.

b. Peacemakers were usually elders and leaders of the community.

c. The Peacemakers resolved disputes between people or settled differences of opinion in the community as to a matter of public concern.

d. Because of the Peacemaker's experience and wisdom, the opinion or decision of the Peacemaker was respected and honored by the community.

3. Halona extends respect given Peacemakers to the courts.

a. "That is because they have a traditional abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this principle from the white man. They have carried it through history".

b. "Those appointed by the people to resolve their disputes were and are unquestioned in their power to do so. Whereas once the clan was the primary forum (and still is a powerful and respected instrument of justice), now the people through their Council have delegated the ultimate responsibility for this to their courts".

B. When Navajo Tribal Courts were established in 1959 the need for an independent judiciary was recognized.

1. Title 7 of the Navajo Tribal Code is titled "Judicial Branch".

2. The Tribal Council in the preamble to the resolution creating the Tribal Courts recognized the need to remove the judges from the pressure of politics.

3. The Court of Appeals was given the jurisdiction to: "hear appeals from final judgments and other final orders of the Trial Court".

4. Provision was made for judges to serve a probationary

period of two years.

5. The Budget and Finance Committee of the Navajo Tribal Council was given the authority to review salaries of probationary judges.

6. Judges were appointed by the Chairman with approval by the Tribal Council.

7. The Chairman was ordered to require completion of a course of judicial training by each probationary judge.

C. Six months after the Tribal Courts were set up the Tribal Council established the Judiciary Committee of the Navajo Tribal Council as a permanent standing committee.

1. Judiciary Committee was authorized to determine qualifications for judges.

2. After determining qualifications the Judiciary Committee was required to screen all applicants and select a panel of the most highly qualified.

3. The Chairman was authorized to appoint a judge from the list submitted by the Judiciary Committee.

4. Subsequent Plans of Operation for the Judiciary Committee expanded the Committees powers and duties toward the Judicial Branch.

D. In 1980 the Supreme Judicial Council was established.

1. It was a judicial panel composed of legislators and judges with power to review certain decisions of the Court of Appeals.

2. The Supreme Judicial Council did not work well and after

only two or three times was never used.

3. In 1985, the statutes creating the Supreme Judicial Council were repealed.

E. Navajo cases recognized the right and duty of the courts to review actions of other parts of the tribal government:

(a) Halona

(b) Tome #2

F. In December, 1985, Tribal Council passed the Judicial Reform Act which was an amendment of Title 7 governing the Judicial Branch.

1. The Tribal Council Resolution adopting the Judicial Reform Act clearly stated: "...Tribal sovereignty requires strong and independent Tribal court to enforce and apply the law".

2. In reference to the Supreme Court, the resolution stated: "In furtherance of the goal of strengthening the Courts of the Navajo Nation, the Judicial Branch must have a court which will hear cases on appeal and render a final judgment based on law, equity, and tradition".

G. The Judicial Reform Act codified and clarified many things which were already the practice.

1. Judicial qualifications.

2. Training and evaluation of probationary judges.

3. Judicial selection and retention.

(a) Probationary Judges

(1) Judiciary Committee screens and selects qualified panel.

(2) Chairman appoints judge from panel

(3) Tribal Council confirms appointment

(b) Permanent Judges

(1) Chief Justice advises Judiciary Committee and Chairman whether probationary judges and justices should be offered permanent appointments.

(2) Judiciary Committee recommends to Chairman whether probationary judge or justice should be recommended for permanent appointment.

III. The concept of Judicial review of governmental actions is grounded both in Navajo tradition and custom and in legislative acts.

A. Halona: Tribal Council authorized an expenditure without the expenditure first being approved by the Budget and Finance Committee as required by tribal law.

1. The Court held that approval of the expenditure was invalid.

a. The Indian Civil Rights Act is a mandate for Indian governments and "requires judicial review of any allegedly illegal action by a tribal government."

b. Sometimes a question of an expenditure reaches the level of civil rights which permits judicial review at the behest of private citizens.

c. The expenditure raised a question peculiar to

Navajo tradition and law.

2. Judicial review of Tribal Council's action was proper.

   a. Sovereign immunity does not protect wrongdoing.

   b. Judicial review of the Tribal Council's actions are not excluded from broad grant of power to the courts by the Navajo Tribal Council.

   c. Navajos have a tradition of respect for impartial adjudicatory process.

      (1) Persons appointed by the People to resolve disputes were unquestioned in their authority to do so.

      (2) Courts have replaced the clan as the primary forum for resolving disputes.

B. Tucson G & E: The Navajo Nation granted a right of way across plaintiff's "traditional use area" without complying with the provisions of the Navajo Tribal Code in granting rights-of-ways. Plaintiffs were entitled to "damages" as provided in Tribal Code.

   1. The government may not take property without just compensation.

   2. The Navajo Tribal Code places the burden on government, not the individual, to see that Navajos are justly compensated if their land use rights are adversely affected by rights-of-way.

   3. Judicial review in this situation was not barred by sovereign immunity.

a. The Constitution of the United States, the Indian Civil Rights Act and the Navajo Bill of Rights are prohibitions on the inherent governmental power of Eminent Domain.

b. No man or no division of the government is above the law.

c. The only reason governments exist is to make secure the rights of the people.

C. Tribal Council provided in laws of Election Commission and other administrative bodies for appeal to the Court of Appeals.

D. The Supreme Court may hear appeals from final administrative orders if provided by law.

E. The Supreme Court and the District Courts have power to issue writs.

IV. "Customary Law" is part of the law of the Navajo Nation.

A. The concept of customary law should be easily comprehended by those who have law degrees.

B. In law schools students are taught to distinguish between common law and statutory law.

C. Statutory law is the written law made by organized legislative bodies.

D. Common law has two sources.

1. Common law is the customs and long used ways of doing things.

a. Whenever people live together in groups they

develop rules to regulate the conduct of members of the group.

b. These rules are passed down from generation to generation and have a very strong effect in the community.

c. Sometimes one or more persons obtains a great knowledge of these rules and their advice is sought when there is a problem in the community.

2. Court decisions recognizing and enforcing the customs or filling in the gaps in the written law also become part of the common law.

E. The Navajo Nation has a body of common law which consists of customary law and court decisions.

1. Navajo customary law is often referred to as Navajo custom and tradition.

2. One Navajo community may have a custom or tradition not followed in another community.

3. Navajo courts are required to apply "any laws or customs of the Navajo Nation not prohibited by applicable federal laws." 7 N.T.C. Sec. 204(a)

4. "Because established Navajo customs and traditions have the force of law, this court agrees with the Window Rock District Court in announcing its preference for the term 'Navajo common law' rather than 'custom', as that term properly emphasizes the fact that Navajo custom and tradition <u>is</u> law, and more accurately reflects the

similarity in the treatment of custom between Navajo and English common law:" Belone.

F. Navajo custom and tradition must be pled and proven.

1. "Where any doubt arises as to the customs and usages of the Navajo Nation the court may require the advice of counsellors familiar with these customs and usages." 7 N.T.C. Sec. 204(b)

2. Navajo custom is a matter for pleading.

(a) "Where a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim. If local custom is alleged, and it is different from the custom generally followed throughout the Navajo Nation, the pleading must so state."

(b) "We hold that where, as here, a party's pleading does not indicate a reliance on Navajo custom, that party may not later offer evidence and seek relief under Navajo custom."

3. Navajo custom may be shown by court opinions, judicially notice, or proven by expect testimony.

(a) An expert witness must be qualified as an expert in Navajo Custom. Belone

(b) If the custom is disputed the Court must conduct an informal conference with all the expert witnesses and arrive at a consensus rather than subjecting the matter to the adversary system. Belone

G. Customary law often offers solutions to problems Anglo laws have dealt with in the past and it provides mechanisms of long use which are just now being recognized by the Anglo systems.

1. The Peacemaker system is really on alternative form of dispute resolution which you may recognize as mediation or arbitration.

2. Wauneka involved the disposition of 10.8 acres of farmland in a probate case were there were several heirs. The whole plot was awarded to one heir.

   a. Customary use areas is the area of land a traditionally inhabited by one's ancestor.

   b. Customary use is a possessory use interest and a property right for which compensation is available for interference with the usage.

   c. "The practical effect of progressive fragmentation of land results in possession of even smaller panels by an astronomical number of heirs... Inevitably, progressive fragmentation decreases the usefulness of the land and the benefits derived from the land diminishes."

   d. The land was awarded to the heir who could best put the land to proper and beneficial use.

   e. The other heirs did not need nor want the land for livelihood.

   f. The other heirs received other generous awards from

the estate.

3. Benally involved a land use permit and a grazing permit.
   a. "Further, under Navajo common law, a person can only maintain a 'right' to productive land if he is personally involved in it's beneficial use".
   b. "The customary trust is called because, in Navajo custom, land is held and managed for the benefit of the clan and the family".
   c. "Therefore, land and grazing permits held in customary trust should descend in somewhat the same way as property held in joint tenancy with right of survivorship. That is, once a customary trust is established, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among more and more owners".
4. Wauneka and Benally represent a customary law solution to a problem which is both Anglo and tribal.
   a. England prevented fragmentation of land by having it pass to the eldest son.
   b. Navajo customary law prevents fragmentation of land by customary trust or passing the land to the one who will best use it for its intended purpose.
5. Goldtooth found joint custody of children to be in keeping with Navajo traditional law.

a. "This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan".

b. The court found this concept to be in harmony until modern trends in child psychology which stress the need of the child to have ongoing relationship with as many members of his/her family as possible.

H. There are times when tradition and custom are applicable in matters other than family and land.

1. Tome #2 addressed, among other things, the issue of the validity of a contract under the Navajo custom.

a. An oral agreement or contract is sacred and once made, it is binding.

b. There are also sacred concepts relevant to making a commitment.

c. The Navajo saying "do not bother what's not yours" implies that an agreement is not binding if one does not have the authority to deal with the matter.

2. Tome #1 said that the court had a duty imposed by Navajo common law to protect the property of the Navajo people and could therefore review governmental action which might result in the illegal disposition of tribal assets.

I. Customary law is being presented and recorded in opinions which are published in the Navajo Reporter.

THE NAVAJO JUDICIAL SYSTEM: RESPONDING TO CHALLENGES AND NEEDS IN A TIME OF CHANGE

by:

Honorable Tom Tso, Chief Justice
Navajo Nation Judicial Branch

For Presentation at the
Indian Self-Determination and the
Vital Role of Tribal Courts

January 19 - 22, 1988
United States Senate
Washington, D.C.

THE NAVAJO JUDICIAL SYSTEM:
RESPONDING TO CHALLENGES AND NEEDS IN A TIME OF CHANGE

I have been asked to speak on the topic of "The Navajo Judicial System: Responding to Challenges and Needs in a Time of Change". This is obviously a long title and for that matter requires a lot of time to cover. However, I intend to focus upon "responding to challenge".

I look up the word "challenge". My dictionary tells me that a challenge is a call to engage in a contest or fight. To me this means that there are at least two parties or participants in a challenge. And so I must ask: If the Navajo Courts are in a challenge, who are the other participants.

The answer is, of course, that the outside system, the federal government, and to a lesser extent state and local governments, are the other participants.

The ultimate challenge to the Navajo has always been survival. Those of you familiar with the history of the Navajo will recall that the Spanish and the United States Cavalry all attempted to wipe us out. In 1864 the United States Cavalry under Kit Carson succeeded in rounding up and driving thousands of Navajos several hundred miles to Fort Sumner. It is not clear what was the objective of this mass removal. Whatever the goal of the U.S. Government toward the Navajo, it didn't work. After four years, the U.S. Government threw up its hands and told us to take our sheep and go home.

This event marked the beginning of the end of federal government efforts to terminate our physical existence.

Since that time the challenge has been to our cultural identity and existence. Before I go further I want to make clear that my remarks today are not made in anger or bitterness. It is just time to speak in realities rather than continue with the false assumptions on which relations between Indians and the Anglo world are conducted.

The false assumption is that the dominant society operates from the vantage point of intellectual, moral and spiritual superiority. The truth is that the dominant society became dominant because of military strength and power.

Examine this from the Navajo perspective. I quote from an article by Tom Tso:

"When people live in groups or communities they develop rules or guidelines by which the affairs of the group may proceed in an orderly fashion and the peace and harmony of the group may be maintained. This is true for the Navajos. As far back as our history can be verified and further back into the oral traditions of our origins, there is a record of some degree of formal organization and leadership. In the earliest world, the Black World, which was the first phase of our existence, it is said that the beings knew the value of making plans and operating with the consent of all. In a later World, Changing Woman appointed four chiefs and assigned one to each of the four directions. These chiefs convened a council, established clans, and organized the world. The chiefs and councils of Navajo oral history made decisions for the larger group and regulated the clans. The oral traditions indicate that there was a separation of functions between war leaders and peace leaders. One of the major responsibilities of these headmen was advice and guidance....

The headmen were chosen by the people from among those who possessed the necessary qualities. A headman needed to be eloquent and persuasive, as power was exerted by persuasion rather than coercion. Teaching ethics and encouraging the people to live in peace and harmony was emphasized. One of the important functions of a headman was dispute resolution. When a dispute or conflict arose in the community the people would go the headman for advice. If the matter involved what we, today, would call a criminal offense, the headman would meet with the wrongdoer, his family, the victim, and the victim's family to discuss how to handle the matter. The discussion usually involved two issues: how to compensate the victim or his family for the wrong and how to deal with the wrongdoer. The discussion

continued until everyone was in agreement
as to what should be done."

Prior to Kit Carson we lived in communities. You might say we had decentralized grass roots government. We had our own mechanisms for resolving disputes. We had a profound respect for the separation of functions. Not only did we have the various leaders for war and peace, we had our medicinemen who have a very important role in the operation of our society. The training and the teachings of the medicinemen were respected and no one interfered with their function. We had our own concepts of fairness in the way we handled disputes and we sought both to compensate the victim and to rehabilitate the wrongdoer.

After we returned to our land in 1868 we began to be told all the things we had to have. We had to have an organized government and a tribal council. We had to have courts. We had to have jails. We had to have separation of powers.

These things and many more have been instituted. They work very well in the Navajo Nation. I believe the main reason the Navajos have, by Anglo standards, the most sophisticated and the most complex tribal court system is that we were able to build upon concepts which were already present in our culture. Navajos are also flexible and adaptable people. We find there are many things which we can incorporate into our lives that do not change our concept of ourselves as Navajo.

What I regret is that the outside world has never recognized that Navajos were functioning with sophisticated and workable concepts before the American Revolution. What I regret even more is that the ways in which we are different are neither known nor valued by the dominant society. Because we are viewed as having nothing to contribute a lot of time has been wasted. Let me be more specific. Anglo judicial systems are now paying a great deal of attention to alternative forms of dispute resolution. Before 1868 the Navajos settled disputes by mediation. Today our Peacemaker courts are studied by many people and governments. Anglo justice systems are now interested in compensating victims of crime and searching for ways to deal with criminal offenders other than imprisonment. Before 1868 the Navajos did this. Today Anglo courts are recognizing the concept of joint custody of children and the role of the extended family in the rearing of children. Navajos have always understood these concepts. We could have taught these things one hundred and fifty years ago.

I repeat: I say these things not in anger nor hostility but in sorrow for the time and resources which have been wasted. Let us not continue to act in the same old ways.

Today the Navajo Courts are structured very much like the state and federal systems. We have six judicial districts and a seventh just

being established. Each district has a trial court and a children's court. The Navajo court system has a second tier which is the Navajo Nation Supreme Court which has three justices. In addition there are the Peacemaker courts which use traditional mediation processes supported by court supervision and enforcement of agreements reached through mediation.

The Navajo Nation Supreme Court hears appeals from final court orders and from some administrative decisions. The tribal government is rapidly developing an extensive network of administrative bodies with quasi-judicial functions. The final decisions of bodies such as the Tax Commissioner and the Board of Election Supervisors are appealable directly to the Navajo Supreme Court. Recourse from the decisions of other administrative bodies is by an original action in the trial court.

All opinions of the Supreme Court and some of the opinions of the District Courts are published in the Navajo Reporter.

The Navajo courts have rules of procedure for criminal, civil, probate and appellate matters.

Navajo judges and justices are selected by a process designed to insulate them from politics. When a judge is to be selected interested persons submit applications to the Judiciary Committee of the Navajo Tribal Council. The Judiciary Committee screens the applicants and selects a list of the most highly qualified according to the qualifications set forth in the Navajo Tribal Code. This list is then sent to the Tribal Chairman. The Chairman appoints a judge from the list for a two year probationary period. This appointment must be approved by Tribal Council. During the probationary period the judge receives training from carefully selected judicial education establishments offering quality legal/judicial education. There are two; the National Judicial College in Reno, Nevada, and from the National Indian Justice Center, Petaluma, California. The probationary judge is evaluated by the Navajo Nation Bar Association, the Judiciary Committee and the Chief Justice. If the probationary judge receives a satisfactory performance evaluation and satisfactorily completes his or her course of training the Chief Justice and the Judiciary Committee recommend the judge for permanent appointment. This permanent appointment must be confirmed by Tribal Council. Thereafter the judge remains in office until retirement or removal under the procedures established in the Tribal code.

Permanent judges continue to be evaluated each year and receive training in areas where the evaluations show that knowledge and skills are lacking.

All parties may represent themselves in the courts. If a party chooses to be represented by counsel, it must be a member of the Navajo Nation

Bar Association. Membership in the Navajo Nation Bar Association requires passing the Navajo bar examination which is given twice a year. Both law school graduates and those who have not been to law school may practice in tribal courts. The practitioners who have not been to law school are called advocates and must complete either a certified Navajo Bar Training Course or serve an apprenticeship.

The contribution of the advocates to the Navajo Court system is beyond measure. Both our language and our traditions made Anglo court systems strange to us. In traditional Navajo culture the concept of a disinterested, unbiased decision maker is unknown. Concepts of fairness and social harmony are basic to us. However, we achieved fairness and harmony in a different fashion. Dispute settlement required the participation of the community elders and all those who knew the parties and a history of the problem. Everyone was permitted to speak. Private discussions with an elder who could resolve a problem was acceptable.

It was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case and where who could speak and what they could say was closely regulated.

The advocates helped the Navajos through this process and the advocates continue to be an important link between the two cultures.

The law the Navajo courts must use consists of any applicable federal laws and tribal laws and customs. The structure of our courts is based upon the Anglo court system but generally the law we apply is our own.

It is easy to understand that the Navajo Tribal Code contains the written law of the Navajo Nation and that this law is available to anyone. When we speak of Navajo customary law, however, many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also call "common law".

Common law is the customs and long used ways of doing things. It is also court decisions recognizing and enforcing the customs or filling in the gaps in the written law. The common law of the Navajo Nation consists of both customary law and court decisions.

In a case decided in 1987 the Navajo Supreme Court said:

> "Because established Navajo customs and traditions have the force of law, this court agrees with the Window Rock District Court in announcing its preference for the term 'Navajo Common Law' rather than 'custom', as that term properly emphasizes the fact that Navajo custom and tradition <u>is</u> law, and more

> accurately reflects the similarity in the treatment of custom between Navajo and English common law".

We have statutes, rules and case law setting forth the procedural aspects of pleading and proving Navajo common law.

Once a decision is made by a court, that decision is subject to change only through judicial processes. No other part of the tribal government has the authority to overrule that decision.

The concept of a separate and independent judiciary is based in both Navajo common law and in the Tribal Code. The Tribal Code establishes the Judicial Branch as a separate branch of government. The integrity of court decisions, however, has its basis in the respect given to the peacemakers or leaders who helped settle community disputes. In a case decided in 1978 the Navajo Supreme Court said that the respect given the peacemakers extends to the courts because Navajos have "... a traditional abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo people did not learn this principle from the white man. They have carried it through history... Those appointed by the people to resolve their disputes were and are unquestioned in their power to do so. Whereas once the clan was the primary forum (and still is a powerful and respected instrument of justice), now the people through their council have delegated the ultimate responsibility for this to their courts".

I could talk for a long time about all the details of the Navajo Tribal government, how many concepts which appear to be Anglo actually have their roots in our culture as far back as we can trace, and about how concepts which are foreign to our culture have been accommodated in such a way that they have become acceptable and useful to us.

It is instructive that the Indian tribe whose governmental structure and operation is most like the Anglo world is the tribe that has no constitution. The Anglo world places much value on the written word and there is a tendency to believe that if things are not written down, they don't exist.

Navajos have survived since before the time of Columbus as a separate and distinct people. What holds us together are not words on paper but a set of values and customs that are the strongest glue. I am speaking of a sense of community so strong we had no need to lock up wrongdoers. If a person injured another or disrupted the peace of the community, he was talked to and often ceremonies were performed to restore him to harmony with his world. There were usually no repeat offenders. Only those who have been subjected to a Navajo "talking" session can understand why this would work. Today we have police, prosecutors,

jails, written laws and procedures. I am convinced our Anglo system of law enforcement is no more effective than the way we traditionally handled law enforcement problems. Our present system certainly requires more money, more facilities, more resources and more manpower. But we have his system and it works as well as those of our brother and sister jurisdictions. The point I am now making is that the Anglo world has said to tribes, "Be like us. Have the same laws and institutions we have. When you have these things maybe we will leave you alone". Yet what the Anglo world has offered, at least as far as Navajos are concerned, is either something we already had or something that works no better than what we had. And this brings me to the challenges I would like to issue to the federal government and to all America. We have survived the challenges to our physical and cultural survival. Now I issue challenges that in many ways may be just as difficult for you.

Let us stop wasting our precious time and resources keeping up the pretense that the Anglo world is the wise parent and Indians are somewhat unruly children who must be trained to Anglo ways.

I know that the popular concept of tolerance in America is the melting pot or stew pot where everyone blends into an indistinguishable ingredient. This is fine for people who come to this country and want to jump into the pot. The melting pot, however, can become a good place to hide people. If differences cause discomfort or problems, make everyone the same. The real measure of tolerance and respect for tribes, however, may well be how well the outside world can co-exist with tribes. We are part of the total environment of America and at least as important as the snail darter or the California condor. What a tragedy if fifty years from now some news commentator is doing a broadcast on how the government has set aside a preserve in the desert where nine Indians are being saved from extinction and it is hoped they will reproduce in captivity.

I challenge you to use the Navajo as a test. We have most of the mechanisms and the institutions which the Anglo world has said are necessary for the protection of civil rights.

I challenge you to relieve the Navajos from the holding of the Oliphant case which prohibits us from exercising criminal jurisdiction over non-Indians. We have non-Indians who have lived most of their lives on the Navajo Nation, who are married to Navajos, who operate Navajo enterprises or are employed in the Navajo Nation. Yet, if that person commits a crime, they are not subject to Navajo law enforcement. What logic is there in this situation?

I challenge you to permit Navajos to have felony jurisdiction and particularly jurisdiction to impose felony sentencing. It is very difficult for us to tell a mother whose only two children have been killed by a hit and run driver that we can imprison that person for

only a short time.

I challenge you to make the Navajo Nation a pilot project. Make the necessary laws and provide the necessary funding for the Navajo Nation to grow and develop in the area of complete law enforcement. Perhaps you will be able to learn something from us. Let us begin to achieve our shared goals of development -- legal, economic, social, moral, spiritual -- through a system of mutual respect and shared contributions.

In conclusion, let me say one other thing. Attempts have been made and will continue to be made to terminate Indian treaties, terminate Indian jurisdiction, do away with tribal courts and tribal government. To those people who have made this attempt and will be making this attempt -- I can only say -- IT IS NOT NECESSARY TO BLOW OUT THE OTHER PERSON'S LIGHT TO LET YOUR OWN SHINE.

Thank you.

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PREPARED

STATEMENT OF SENATOR DANIEL J. EVANS

MR. CHAIRMAN and my distinguished colleagues, we are here today to conduct an oversight hearing on tribal court systems and the Indian Civil Rights Act.

For the past two days there has been a most distinguished group of participants assembled here in Washington for the working conference on court systems in Indian Country. Included in this group are law professors, tribal and state judges, practicing attorneys, and government officials from all over the United States indicating the importance of this issue.

An essential litmus test of a democracy's ability to govern itself is the weight of the responsibility it delegates to its judicial system. An essential litmus test for any judicial system is the faith and respect it earns from those over whom it presides. For democracy cannot truly be served without a just and trusted judicial system.

The authority for establishment of tribal courts is found in the inherent sovereignty of the tribes themselves. It is Congress's duty to ensure that tribal courts are provided with the necessary resources to operate at the same professional and equitable level as its federal, state and local counterparts.

In 1968 Congress enacted the Indian Civil Rights Act setting forth the rights of individuals under tribal governments parallel to those found in the first 10 amendments to the United States Constitution. That Act has enormous ramifications on the carriage of justice in Indian Country, and has opened up serious questions that perhaps we can address here today.

I look forward to hearing the various viewpoints on an issue of growing concern today, the issue brought to the fore by the Civil Rights Commission, whether tribal courts ensure an adequate protection of the basic civil rights shared by all citizens of this country. I would especially appreciate hearing that discussion as it meshes with the equally weighty issues of tribal sovereignty, the right of tribes to make their own laws, define them, live by them, to protect those they govern, and to define those protections, from Due Process to the Right to Counsel.

Specifically, I am interested in hearing discussion of the legal anomaly which has developed in the case law, first, that tribes would like jurisdiction over all people and entities within their territories, both Indian and non-Indian. Yet, the tribes adamantly oppose any substantive review of the basic civil rights afforded those who fall subject to that jurisdiction. Second, critics of tribal sovereignty seek wholesale substantive review of tribal court decisions; yet, they adamantly oppose tribal jurisdiction over non-Indians and non-members.

Personally, I think we should consider a greater role for the Federal courts in reviewing the substantive protections of basic civil rights in tribal courts, and accordingly, an expanded jurisdiction of Indian tribes based on territorial sovereignty and not upon the race of the parties involved. Perhaps here today we can begin a process for formulating factors to determine when and to what extent tribes can once again exercise the cornerstone of self-government -- the right to enforce their laws territorially, so that their societies can be a true reflection of their cultures and values, however similar to or different from ours they tend to be.

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